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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

VILLAGE OF CRESTWOOD, ILLINOIS, and CHESTER STRANCZEK, Mayor of Crestwood, Illinois, in his official capacity,

Petitioners,

v.

JOHN DOE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a Village violate the Establishment Clause by sponsoring a 45-minute traditional Italian mass on a Saturday afternoon as part of a weekend-long Italian Festival celebrating Italian culture and heritage?

2. Is direct or indirect government coercion a necessary element of an Establishment Clause violation?

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JOHN DOE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The original order of the court of appeals denying petitioners' emergency motion for stay is not reported, and is reproduced in the appendix at A-1. The opinion of the court of appeals is reported at 917 F.2d 1476 (7th Cir. 1990), and is reproduced in the appendix at A-2. The order denying rehearing in banc is not reported, and is reproduced in the appendix at A-38.

The temporary restraining order of the district court is not reported, and is reproduced in the appendix at A-40. Because that order incorporates by reference oral findings and conclusions made at the hearing, a transcript of the hearing is reproduced in the appendix at A-49.

JURISDICTION

The opinion of the court of appeals was entered on October 26, 1990. Petitioners filed a petition for rehearing with a suggestion for rehearing in banc, which was denied by a six to five majority of the full court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION

This case involves the Establishment Clause of the First Amendment to the United States Constitution as it applies to the States through the Fourteenth Amendment. The Establishment Clause states: "Congress shall make no law respecting an establishment of religion . . . ."

STATEMENT OF THE CASE

A. The Village's "A Touch of Italy" Festival.

During the weekend of August 10 to 12, 1990, the Village of Crestwood hosted a festival to celebrate Italian culture, ethnicity, and heritage, which it called "A Touch of Italy." The Village planned Italian entertainment, with Italian music and comedy, Italian sporting events including boccie ball, Italian food and drink, and displays celebrating Italian culture. These displays included photographs and exhibits, borrowed from the University of Chicago and the University of Illinois, depicting the history of Italians

in America. The festival took place in Caesar Park, which is owned and operated by the Village.

The festival included an authentic Italian Mass, which was to be celebrated by an Italian-speaking priest for approximately forty-five minutes at 4 p.m. on Saturday, August 11, 1991 in the Beer Garden tent at Caesar Park. The Crestwood Women's Club, a private organization, planned the mass and paid for all materials and expenses incurred in connection with the mass. The Village incurred no incremental cost in relation to the mass. This was the Village's second annual Italian festival; an Italian mass was celebrated at the first as well. The park also had been used for Polish festivals, each having an authentic Polish mass, for the previous six years.

The Village of Crestwood advertised the festival in its monthly publication, the "Crestwood Adviser." A-37, A-78. The full front page of the August issue is an advertisement (approximately 13½" × 11½") for the festival, and includes a small notice for the mass. The front-page headline of the "Adviser" reads:

And the stars come out
at Crestwood

Photographs of the advertised entertainers, including Al Martino and Buddy Greco, are displayed below this headline. A-78. Beneath the photographs is another set of headlines, which read:

Crestwood Celebrates An Incredible Weekend!
Join Us for 3 Evenings of Superb Entertainment
at Crestwood's Beautiful Caesar Park.

Beneath this set of headlines is a box (6" × 4") advertising:

Our 2nd Annual—Festo Italiano!
A TOUCH OF ITALY

This box contains an outline of Italy in which is written "CRESTWOOD GOES ITALIAN"; one insert box (1″ × 3″) advertising "Delizioso Italian Foods, Wines & Beers" and the admission fee, "Costo," of $5.00; and another insert box (1″ × 2″) that reads: "Join Us for a Traditional Italian Mass Celebration at 4 p.m.—Sat., August 11th. No admittance charge for Mass." A-37. The front page ad also invited people to "Visit the Italian Culture Exhibit." Finally, the third page contains a short report about the Italian festival and mass.

B. The District Court Decision.

Shortly after noon on August 10, 1990, the day before the scheduled mass, John Doe served a complaint challenging the mass under 42 U.S.C. §§ 1983 and 1988, 28 U.S.C. § 2001, *et seq.*, and the First and Fourteenth Amendments to the United States Constitution, and seeking preliminary and permanent injunctive relief. Jurisdiction vested in the district court pursuant to 28 U.S.C. §§ 1331 and 1343. About an hour later, Doe served a motion for a temporary restraining order, a supporting memorandum, and motions to proceed anonymously and for leave to file his declaration as a suppressed document. Doe, a 17-year resident of Crestwood, claimed he had standing to challenge the mass based upon his status as a taxpayer in Crestwood and upon the fact that he would avoid the park during the mass.

The district court held a hearing commencing at about 5:00 p.m. on August 10th. A-49. Based upon the advertisement in the "Crestwood Adviser," and the fact that the woman who recruited the priest was a Village employee (though she was also a member of the private Women's Club planning the mass) the district court found that the

Village, rather than the Crestwood Women's Club, was sponsoring the mass as a part of its festival.[1] A-71. Applying the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (though not without expressing dissatisfaction with that test—the court noted that it was "[f]amiliar enough [with the *Lemon* test] to know that nobody understands it entirely" A-59), the district court held that the Village's sponsorship of the mass had "an impermissible religious effect" that rendered it unconstitutional. A-46. Consequently, the court entered an oral temporary restraining order at 5:35 p.m. on August 10. A-71. The court issued a written order the following morning. A-40.

C. The Court of Appeals Decision.

Petitioners filed a notice of appeal immediately after the district court's oral ruling. A-76. When the district court refused to stay its order pending appeal, petitioners filed a short motion for an emergency stay with the court of appeals, the only paper petitioners had the opportunity to file before the court issued its opinion. The next day, August 11, 1990, a divided panel issued a three-sentence order denying petitioner's stay motion and stating that "[a]n explanation will follow in due course." A-1. Petitioners complied with the restraining order and no mass occurred in Caesar Park that afternoon.[2]

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[1] Although petitioners argued below that the Women's Club sponsored the mass, they do not challenge the district court's finding to the contrary in this Court. Consequently, this Petition squarely presents this Court with the question whether a Village-sponsored Italian mass held as a part of a festival celebrating Italian culture and heritage violates the Establishment Clause.

[2] Proceedings continued in the district court relating to Doe's request for permanent injunctive relief. On September 19, 1990, peti-

(Footnote continued on following page)

On October 26, 1990, without further briefing, the court of appeals issued its opinion. After deciding that the order was "an 'injunction' within the meaning of § 1292(a)(1) . . . ," A-3, the majority turned to the question of Doe's standing. The majority ruled that Doe's status as a taxpayer was irrelevant because the Village incurred no incremental expense for the mass. A-4. The majority found standing, however, based on Doe's allegation that he would not come to the festival during the 45-minute mass. *Id.*

On the merits, the majority opined that celebration of the Italian mass in Caesar Park violated the Establishment Clause. The majority held that under "[p]revailing doctrine," a government can never sponsor a religious service: "A religious service under governmental auspices necessarily conveys the message of approval or endorsement." A-5. In other words, as the majority put it, "even a herd of reindeer and a forest of jumbo candy canes could not neuter a mass." A-5, 6.

A vigorous dissent noted that the majority had failed, despite explicit direction from this Court, to examine the mass in context: "it was to be a distinctively *Italian* mass conducted in the national language of Italy for the purpose of portraying an Italian tradition in the context of a festival celebrating the Italian heritage of many of Crestwood's residents." A-7 (original emphasis). Hence, "there was no danger of this celebration of the mass being per-

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[2] *continued*

tioners moved to dismiss because they had no plans at the time to sponsor future ethnic festivals with masses. At the district court's request, Mayor Stranczek submitted a statement to this effect on October 16, and the court granted the motion, over Doe's objection, on November 21, 1990. Doe filed a notice of appeal on December 20, 1990, but voluntarily dismissed his appeal on January 11, 1991.

ceived by a *reasonable observer* as an attempt by the Village of Crestwood, Illinois to establish Roman Catholicism as the official religion." A-8 (original emphasis). Based upon an application of the *Lemon* test, the dissent concluded that the Village's sponsorship of this Italian mass in the context of the Italian festival would not violate the Establishment Clause. A-22. Nevertheless, the dissent expressed dissatisfaction with an Establishment Clause jurisprudence that bestowed standing for an injury that was "contrived and imaginary": exclusion from the Beer Garden tent for 45 minutes during the mass. A-26. Consequently, the dissent expressed a preference for the "coercion" standard proposed in a dissenting opinion in *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3134-46 (1989) (Kennedy, J.). A-28.

On November 9, 1990, petitioners filed a petition for rehearing and suggested rehearing in banc. On January 7, 1991, after requesting a response from respondent to the petition, the court of appeals denied the petition by a vote of six to five. A-38.

REASONS FOR GRANTING THE WRIT

The holding of the court of appeals, that "[a] religious service under governmental auspices necessarily conveys the message of approval or endorsement," A-5, is unprecedented. Indeed, the court's view that secular trappings must "neuter" government-sponsored religious prayers or services stands squarely in conflict with fundamental Establishment Clause principles, as set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and developed in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and in *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989).

The decision below thwarts a local government in its effort, not to establish a religion, but to enable its citizens, on a wholly voluntary basis, to learn firsthand about their neighbors' religion. Festivals like the Village's serve the salutary purposes of celebrating our country's richly diverse ethnic and religious heritage and of educating the general public about the many distinctive groups that make up our populace. Education replaces ignorance and mistrust with knowledge and understanding. As "[w]e are a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), non-coercive demonstrations of how certain groups worship can only enhance this education.

More importantly, the decision below will have a direct and devastating impact upon the very fabric of American society. In a few short pages, it has written the end to more than 200 years of "religious service[s] under governmental auspices" in this country, including military chaplains, state-sponsored funerals for high office-holders, and sectarian prayers recited at presidential inaugurations. The decision below also threatens the long-entrenched government practice of celebrating our nation's diverse religious heritage by singling out and honoring various religious groups from time to time and by calling upon its citizens to attend services and pray.

On March 18, 1990, this Court issued a writ of certiorari in *Lee v. Weisman*, No. 90-1014, to address the related question of state-sponsored prayer in the context of a school graduation ceremony. The second question presented in *Lee*, *i.e.*, whether direct or indirect government coercion is a necessary element of an Establishment Clause violation, is squarely presented by this case in a non-school context. Like *Lee*, this case presents an excellent opportunity to re-evaluate the *Lemon* test: the district court

confessed to not understanding it, A-59; the court of appeals majority never cited it, A-2—A-7; and the dissent expressed dissatisfaction with it, A-28. Indeed, together with *Lee*, this case offers the Court the opportunity to address in a very broad context the current tangle that is Establishment Clause case law.

I.

THE ESTABLISHMENT CLAUSE DOES NOT CONDEMN "RELIGIOUS SERVICE[S] UNDER GOVERNMENTAL AUSPICES."

A. The very first official act of the first President of the United States immediately after his inauguration was to attend a "religious service under governmental auspices." On April 29, 1789, the Congress passed the following joint resolution to hold this religious service: "*Resolved*, . . . That, after the oath shall have been administered to the President, the Vice President, and members of the Senate, the Speaker and members of the House of Representatives, will accompany him to St. Paul's Chapel, to hear divine service, performed by the Chaplain of Congress." Stokes, *Church and State in the United States*, Vol. I, p. 485 (1st ed. 1950) ("Stokes"). As one historian has written, "It is to be noted that this was not a service provided by an Episcopal church to which senators and representatives were invited, but an official service carefully arranged for by both houses of Congress and conducted by their duly elected chaplain, who happened to be the bishop of the Episcopal diocese of New York." *Id.*

At the most recent presidential inauguration, on the west front of the Capitol Building, the Reverend Billy Graham led the President, the President-elect, the Vice President-elect, the Justices of this Court, and members

of Congress and of the Cabinet in a distinctly sectarian prayer that "consecrate[d]" Mr. Bush. 135 Cong. Rec. S67 (daily ed. Jan. 20, 1989). The Reverend Graham concluded this prayer by saying: "All this we pray in the name of the Father, the Son, and the Holy Spirit. Amen." *Id.*

Throughout the 202 years between these two events, religious services have occurred regularly under government auspices. This Court has noted President Washington's proclamation making November 26, 1789 " 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God.' " *Lynch*, 465 U.S. at 675 n.2 (citation omitted). Less often recounted is President John Adams's more striking designation of May 9, 1798 "as a day of solemn humiliation, fasting, and prayer." Stokes, p. 488. Most recently, President Bush issued Proclamation 6257 setting aside April 5 through 7, 1991 for prayers and thanksgiving "to Almighty God" for the successful liberation of Kuwait. This proclamation recites King David's Prayer, from 1 Chronicles 29:11-13, and excerpts of two Psalms.[3]

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[3] An opinion from Attorney General Wickersham to President Taft explaining a limit on the presidential proclamation power also sheds some light on the propriety of religious services under governmental auspices. In 1911, President Taft received a petition asking him to proclaim September 22, 1912 a national holiday to commemorate the fiftieth anniversary of the Emancipation Proclamation. The Attorney General opined that the President had the power to issue a proclamation "calling upon the people on that day, laying aside their usual vocations, to repair to their churches and unite in appropriate services of praise and thanksgiving to Almighty God," but that if "it is desired that especial national observance be paid to the anniversary of the issuance of the emancipation proclamation by making it a legal holiday, and *providing for appropriate services under national auspices*, the matter should be brought to the attention of Congress . . . ." 29 Op. Atty. Gen. 52, 53-54 (1911) (emphasis added).

The history of our legislative branch provides an important example of religious services under governmental auspices. Beginning around 1800, the House of Representatives authorized the use of its hall for regular Sunday religious services. Stokes, pp. 499-507. Services were conducted by the chaplains of Congress or by visiting ministers; the Marine Band often played at these services. *Id.* at 499. One chaplain of Congress in the 1840's and 1850's wrote of his experience: "The duties of the Chaplaincy were simple enough. To open the two Houses of Congress with prayer daily, to preach in the Hall of Representatives on Sunday morning; . . ." *Id.* at p. 505.

Although "[t]he matter of the official Sunday services has been so generally overlooked by historians," Stokes, p. 501, it merits study in this context because of who attended these services. Thomas Jefferson, author of the Virginia Statute of Religious Liberty of 1786 and of the famous letter to the Danbury Baptist Association that contained the phrase—sometimes substituted for the language of the Establishment Clause itself—"a wall of separation between church and State," frequently attended these official Sunday services while president. *Id.* at 499. James Madison, author of the Memorial and Remonstrance Agreement Religious Assessments, co-author of the Virginia Statute of Religious Liberty, and "the most important architect among the Members of the House" of the Bill of Rights, also attended these official services when he was president. *Id.* at 501. *See generally Wallace v. Jaffree*, 472 U.S. 38, 91-100 (1985) (Rehnquist, J., dissenting).

The actions of Jefferson and Madison in this regard are most telling. As this Court noted in *Marsh v. Chambers*, 463 U.S. 783, 790 (1983), "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that

Clause applied . . .—their actions reveal their intent." Those in the forefront of the battle to prevent the establishment of a national church obviously held the view that religious services could be held under government auspices consonant with the First Amendment.[4]

Other examples abound. Justice Rehnquist points out in his dissenting opinion in *Wallace* that President Jefferson also entered into a treaty with the Kaskaskia Indians of Illinois that provided annual cash support to build the Tribe's Roman Catholic church and to pay its priest. For almost 100 years after this treaty, Congress provided financial aid to sectarian education for Indians. *Wallace*, 472 U.S. at 103-04 & n.5. The dissent below provides several examples of government-sponsored services, including the Roman Catholic funeral services for President John Fitzgerald Kennedy and the government's employment of chaplains who conduct regular religious services for the military. A-12.

The very fact that Christmas is a national holiday undercuts the view of the legality of the mass taken by majority below. As the *Lynch* Court recognized, Christmas itself is "Christ's Mass," 465 U.S. at 683. By law, Christ's Mass is celebrated by the closing of governments, banks,

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[4] Jefferson's attendance is of particular significance because, unlike his predecessors and successors, he refused even to issue proclamations calling for a day of prayer and thanksgiving. He explained: "In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; . . . ." Writings of Jefferson (Ford ed.), VIII, 344. Jefferson thus distinguished, for Establishment Clause purposes, between the impermissible government act of telling citizens to pray, on the one hand, and the permissible government act of sponsoring wholly voluntary religious services, on the other.

and businesses across the country. The recognition of Christmas as a national holiday is often justified based upon its secular aspects, *see, id., American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986), but no one has ever suggested that the secular aspects of Christmas must "neuter" its profound and fundamental religious character as a precondition to recognizing it as a legal holiday.[5]

Orchestras and choral groups that are subsidized and supported by government funds perform masses from time to time, and the beauty of the music does not "neuter" the religious message of these masses. Johann Sebastian Bach's "Mass in B Minor" (BWV 232), for example, has a Kyrie, a Gloria, a Credo, a Sanctus, and an Agnus Dei. So do Joseph Haydn's "Nelson" Mass (Missa In Angustiis, Hob XXII:11), Wolfgang Amadeus Mozart's "Requiem Mass" (K. 626), Ludwig van Beethoven's "Missa Solemnis" (Op. 123), and countless other works.[6] Other pieces, like Handel's "Messiah" and the St. Matthew and St. John Passions of Bach (BWV 244, 245), while not masses, do celebrate the story of Jesus or the Apostles with libretti taken from the Old and New Testaments. Moreover, it is common, when these masses and other religious pieces are played, to have the religious text set forth in the program and

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[5] As a note of interest, counsel's research for this Petition was stymied briefly by the fact that the Cook County Public Law Library was closed on March 28, 1991 for Good Friday. As it happens, Good Friday, which commemorates the crucifixion and has virtually no secular aspects, is a legal and public school holiday throughout Illinois, by act of its General Assembly. Ill. Rev. Stat. ch. 17 ¶ 2201(a) (Supp. 1990); *id.*, ch. 122 ¶ 24-2.

[6] The Chicago Symphony Orchestra, which receives some funds from the National Endowment for the Arts and the Illinois Arts Council, opens its next season with "Missa Solemnis."

translated so that all present can understand what is being performed.

Thus, the error in the majority's ruling below that a religious service cannot be held under government auspices is manifest. It is not the law that any religious service or display must be "neutered" before it can be sponsored by the government.

B. Application of the three-pronged *Lemon* test with this background firmly in mind will yield a result consonant with the principles of the Establishment Clause.[7] The first prong of *Lemon* is "secular purpose." The mass slated for the Beer Garden tent in Caesar Park had a secular purpose: to educate interested or curious persons of all faiths and nationalities about Italian culture. In the cogent words of Justice O'Connor, the Village was serving "the legitimate secular purpose" of "encouraging the recognition of what is worthy of appreciation in society," and not "mak[ing] religion relevant, in reality or public perception, to status in the political community." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

Presidential proclamations often serve the same function. For example, Proclamation 6127 (May 3, 1990) addresses Jewish Heritage Week. After noting that our nation has been built by "people of different races and religions" and that "our cultural heritage ha[s] been enriched immeasur-

[7] When applying the *Lemon* test, however, it is imperative to keep the history of the Establishment Clause and the practices of the Founding Fathers in mind "because the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests." *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting). For this reason, the Village urges this Court to abandon *Lemon* in favor of a "coercion-based" test that does rest upon a sound historical and constitutional foundation. (*See* Section II below.)

ably by this diversity," the President described the significance of the Jewish holidays of Passover, Shavuot, and Yom HaShoah (Holocaust Memorial Day). The language of Proclamation 6127 is of particular note here. Speaking of Yom HaShoah, the President states: "By *joining* in this commemoration, . . . *we* renew *our* determination to defend the dignity and worth of every human life . . . ." (Emphasis added.) This proclamation thus uses precisely the language found in the "Crestwood Adviser" that the courts below found to offend the Establishment Clause: "Join us for a Traditional Italian Mass Celebration." A-6, A-46. *See also* Proclamation 6218 for Italian-American Heritage and Culture Month (noting that Italy "hosts the Holy See in Rome, the spiritual home of millions of people throughout the Nation and the world"); 5866 for Religious Freedom Week (quoting the words of Leviticus 25:10 that are inscribed on the Liberty Bell); and 5670 for American Gospel Arts Day.

The historical perspective is perhaps most important in evaluating the second *Lemon* prong, the "advancement" or "endorsement" of religion. The authentic Italian mass occupied only 45 minutes in the context of a weekend festival celebrating the Italian culture and heritage. It occurred in a public park rather than at the seat of Village government. *Compare County of Allegheny*, 109 S. Ct. at 3104 (creche in main hall of county building). It was advertised in advance so that anyone who wished to attend, regardless of faith, could—and anyone who wished to avoid it likewise could. *Compare*, *id.*; *City of St. Charles*, 794 F.2d at 267 (35-foot tall Latin cross atop city's three-story fire department building). And nothing in the record suggests that anyone, even Doe, seriously believed that "status in the political community" depended upon being Roman Catholic. *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring).

In terms of the Establishment Clause, the Italian mass is insignificant in comparison to the Reverend Billy Graham leading virtually every constitutional officer of all three branches of the federal government in a prayer to the Holy Trinity—an event reported by the media to all corners of the country. The mass likewise cannot compare to more than 50 years of regular Sunday religious services in the House of Representatives, or to almost 100 years of aid to sectarian education. Nor can the mass here be considered more of an endorsement of religion than the Episcopal ceremony that the Congress arranged to celebrate the inauguration of our nation's first President. With our constitutional history as its judge, this mass is no endorsement of religion.

Finally, there is no "entanglement" with religion here. As the majority below noted, Doe "does not contend . . . that any of the costs of this service will be borne by the Village," A-4. *See Lynch*, 465 U.S. at 684. In six years of Polish festivals and masses, there is no evidence of any political divisiveness. *Id.* And although a Village official—who belonged to the private Women's Club that planned and paid for the mass—contacted the priest, this is not a case, like *Lemon*, where ongoing activities will require any kind of "continuing state surveillance." 403 U.S. at 619.

II.

THIS COURT SHOULD ADOPT A RULE THAT THE ESTABLISHMENT CLAUSE IS NOT VIOLATED ABSENT DIRECT OR INDIRECT GOVERNMENT COERCION.

One fact is abundantly clear in this matter: there is an absolute absence of coercion, direct or indirect, in relation to the Italian mass. The mass and festival were offered, on a voluntary basis, to anyone who wished to attend.

No one, including Doe, was forced to attend. Indeed, the mass was advertised, meaning that anyone who might be offended could avoid the Beer Garden tent for its brief duration. That this mass would be enjoined is symptomatic of the confusion that surrounds the Establishment Clause today.

Recent pronouncements by this Court reveal that a majority of its members are dissatisfied with the three-prong test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See County of Allegheny*, 109 S. Ct. at 3134 (Kennedy, J., concurring in the judgment and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order"); *Wallace*, 472 U.S. at 112 (1985) (Rehnquist, J., dissenting) (*Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results"); *Aguilar v. Fenton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (expressing "doubts about the entanglement test"); *Roemer v. Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in the judgment) ("I am no more reconciled now to *Lemon I* than I was when it was decided . . . The threefold test of *Lemon I* imposes unnecessary, and . . . superfluous tests for establishing [a First Amendment violation]"); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("pessimistic evaluation . . . of the totality of *Lemon* is particularly applicable to the 'purpose' prong.")

The history of the First Amendment strongly supports the conclusion that the Founding Fathers intended that direct or indirect government coercion would be necessary for a violation of the Establishment Clause. For example, when introducing the Establishment Clause in the First Congress, James Madison said that he "apprehended the

meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship it in a manner contrary to their conscience." 1 Annals of Congress 730 (J. Gales ed. 1834) (Aug. 15, 1789). Madison also said that the Clause would prevent the situation in which "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 731. Thomas Jefferson's Virginia Bill for Religious Liberty, which addressed the same issues, provided in part: "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief." 12 Hening, Statutes of Virginia 84 (1823). *See generally*, McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

The *Lemon* test provides precious little guidance for deciding Establishment Clause issues. *Lemon* and its progeny have confused lower courts and confounded government officials who are trying to conduct the business of their governments in accordance with the First Amendment. Moreover, the uncertainty concerning the scope of the Establishment Clause means that it can be used—as it was here—as a sword in the hand of a single individual to attack any public religious expression, rather than as a shield to protect the nonadherent or the member of a religious minority from coercion in religious practice or estrangement from society. Thus used, the Establishment Clause puts the nation into the position of "preferring those who believe in no religion over those who do believe." *Zorach*, 343 U.S. at 314. This certainly is not the result intended by the Founding Fathers.

This case provides this Court with an opportunity to provide clear guidance on the meaning and scope of the Establishment Clause. Consequently, even though proper consideration of this matter under the *Lemon* test would result in reversal, this Court should hold that the Establishment Clause is not violated absent direct or indirect government coercion, and reverse on that ground.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted and the case set for plenary review. Alternatively, this Court should hold the petition for disposition in light of *Lee v. Weisman*.

Respectfully submitted,

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Dated: April 8, 1991

APPENDIX

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

AUGUST 11, 1990

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

No. 90-2735

JOHN DOE,

Plaintiff-Appellee,

vs.

VILLAGE OF CRESTWOOD, ILLINOIS, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 90 C 4655—Milton I. Shadur, Judge.

ORDER

Treating the papers filed as a motion to stay the district court's temporary restraining order, the motion is DENIED. Judge Coffey dissents and would issue a stay. An explanation will follow in due course.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-2735

JOHN DOE,

Plaintiff-Appellee,

v.

VILLAGE OF CRESTWOOD, ILLINOIS, and CHESTER STRANCZEK, Mayor of the Village of Crestwood, in his official capacity,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 4655—**Milton I. Shadur,** *Judge.*

SUBMITTED AUGUST 11, 1990—DECIDED AUGUST 11, 1990
OPINION OCTOBER 26, 1990

Before COFFEY, FLAUM, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* "A Touch of Italy" in the Village of Crestwood, Illinois, is a municipal festival in its second year. The Village has sponsored a Polish festival for six years. Sometime during each festival, a mass has been celebrated—in Polish during the Polish festival, in Italian during "Touch of Italy". John Doe, a pseudonymous resident of Crestwood offended by the religious observance, filed this suit on Friday, August 10, 1990, the first day of this year's Italian festival, seeking an injunc-

tion against the celebration of the mass, scheduled for 4:00 p.m. the next day. Late Friday afternoon the district judge held a hearing and stated that the mass would be enjoined. A temporary restraining order issued Saturday morning.

Although 28 U.S.C. §1292(a)(1) does not authorize appeals from temporary restraining orders, *San Francisco Real Estate Investors v. Real Estate Investment Trust of America*, 692 F.2d 814, 816 (1st Cir. 1982); *Stricklin v. University of Wisconsin*, 420 F.2d 1257, 1259 (7th Cir. 1970), the order forbidding the observance of mass is not properly characterized as a "temporary" restraint. Drawing a line between appealable preliminary injunctions and non-appealable TROs makes sense when the TRO holds things in stasis to facilitate an orderly decision. Appellate consideration of such an interim step might disrupt the review the order was supposed to permit, and TROs are so short in duration that an appeal commonly could not be completed before their expiration. Better to allow things to proceed in the district court than to fight at length about the brief interlude until a decision may be rendered on the merits. Nomenclature does not determine whether an order is a preliminary injunction, however, *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987); *Sampson v. Murray*, 415 U.S. 61, 86-88 (1974), and the name attached to this order is imprecise. It does not create a little delay pending decision. Rather it forbids the mass, which will not be rescheduled. No further proceedings in the district court concerning this mass are in prospect. All questions concerning the 1990 festival have been wrapped up, leaving only the plaintiff's request for an injunction against recurrence. This order is an "injunction" within the meaning of §1292(a)(1), and the notice of appeal therefore invokes our jurisdiction. *Belknap v. Leary*, 427 F.2d 496, 498 (2d Cir. 1970); see also Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Eugene Gressman, 16 *Federal Practice and Procedure* §3922 (1977 & 1990 Supp.) (collecting cases).

Caesar Park, a public park in Crestwood, is the home of the Festival. A "Beer Garden tent" in the Park houses several of the Festival's activities, including concerts each evening from August 10 through 12. Crestwood Women's Club, which was formed in 1931, holds the license under which the Beer Garden sells its liquor. An employee of the Village who is also a member of the Club invited Father Angelo Biancalana, a Roman Catholic priest, to celebrate mass in the tent on Saturday afternoon. According to the verified complaint this service, which the Village calls an "Italian Mass" because it will be said in Italian, will include the customary prayers and Eucharist of the Roman Catholic church. An altar will be installed in the Beer Garden tent for the occasion; plans call for display of a cross and lighted candles. Plaintiff does not contend, however, that any of the costs of this service will be borne by the Village. Doe represents that he will stay away from the Festival while the mass is underway. But for the mass, the tent would be used as a beer garden between the opening (3:00 p.m. Saturday) and the first concert of the evening, so Doe suffers the same kind of injury as the plaintiff in *ACLU v. City of St. Charles*, 794 F.2d 265, 267-69 (7th Cir. 1986), and has standing.

Crestwood not only owns the Park but also sponsors the Festival. The Park is a public forum. If the Festival, too, is open to private groups that wish to participate, and if the Crestwood Women's Club (or a church) were the sponsor of the mass, it would be difficult to find an obstacle in the establishment clause of the first amendment. Music acts, cultural exhibits, food booths, bingo, and the like attest the scope of the Festival. A government may not close its public forums to religious practice by private parties. *Widmar v. Vincent*, 454 U.S. 263 (1981); *Fowler v. Rhode Island*, 345 U.S. 67 (1953). Although the holding of a mass in a public park creates a possibility that some members of the public will assume sponsorship (as opposed to acquiescence) by the polity, the government's obligation not to discriminate against religious speech in circumstances in which secular speech would be

allowed prevails. See *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (Pope may hold a mass on the Mall, despite the substantial costs of crowd control and cleanup, when the Park Service bears similar costs for secular demonstrations).

Owning a public forum is one thing, sponsoring a mass quite another. A religious service under governmental auspices necessarily conveys the message of approval or endorsement. Prevailing doctrine condemns such endorsement, even when no private party is taxed or coerced in any way. *Allegheny County v. ACLU*, 109 S. Ct. 3086, 3100-01 (1989); *American Jewish Congress v. Chicago*, 827 F.2d 120, 128 (7th Cir. 1987); *City of St. Charles*, 794 F.2d at 270-71. See also *Gilfillan v. Philadelphia*, 637 F.2d 924 (3d Cir. 1980) (Pope's mass in a public park is an unconstitutional endorsement of religion when the city pays for the construction of the altar).

This is so even when the endorsement takes place in company with secular events, such as the foods, crafts, and entertainment offered at the Festival. Both *Allegheny County* and *Lynch v. Donnelly*, 465 U.S. 668 (1984), hold that government may display a religious symbol (a menorah in *Allegheny County*, a crèche in *Lynch*) without endorsing religion when the context demonstrates that the government is not taking a stance. Two contexts mattered—first the season, for in each case the government was displaying the symbols appropriate to the time of year; second the immediately surrounding symbols, for in each case the government was displaying an assortment of symbols appropriate to all aspects of the holidays. Christmas and Hanukkah are secular as well as religious holidays; to use symbols appropriate to all aspects of the occasion is not to endorse a particular religion. *Mather v. Village of Mundelein*, 864 F.2d 1291 (7th Cir. 1989). If Christmas may be a secular holiday, the state may recognize whose birthday is being commemorated. Under the approach of *Allegheny County*, *Lynch*, and *Mundelein*, even a herd

of reindeer and a forest of jumbo candy canes could not neuter a mass—a religious observance that does substantially more than mark the birth of a figure with religious significance. The mass celebrates the life, teachings, death, resurrection, and Ascension of Jesus; it is an occasion for worship, not for putting a holiday in a historical context that happens to be religious. If secular symbols could not remove the implication of endorsement from a mass at Christmas (and we believe they could not), then food, beer, and bingo are insufficient to render a mass "secular". Although the seat of the Roman Catholic Church is in Rome, Christianity is not distinctively Italian, and homage to Italian culture and food does not imply religious observance. When the Court held that a state legislature may open with prayer, it did so because of the deep roots of the practice, not because prayer in the context of legislation is secular. *Marsh v. Chambers*, 463 U.S. 783 (1983). Celebration of the Eucharist is a significant step beyond a short, non-denominational prayer.

So everything turns on who is putting on this mass. Is it the Village, or is the church or a private club sponsoring a mass in the Village's public forum? The district court found that the Village is the sponsor, and we do not believe this to be clearly erroneous. Doe's verified complaint states that the Village is the sponsor. The Village concedes that one of its employees selected and recruited the priest. An article in a newspaper published by the Village bears the headline: "**Italian Mass to be celebrated at our Italian Fest**". As the district judge emphasized, "our" implies that the mass and Festival alike are under the Village's sponsorship. The article does not mention the Crestwood Women's Club. A display in the same issue touts the Festival; an inset box inveigled the reader to "Join Us for a Traditional Italian Mass Celebration at 4 p.m. - Sat., August 11th. No admittance charge for Mass." Apparently "us" is the Village, the only identified sponsor. We reprint the display as an appendix to this opinion.

Perhaps additional materials would show that the Crestwood Women's Club is the true sponsor of the mass. The Village's attorney represented to the district judge that it is. But the Village did not produce any publicity materials showing that the Club sponsors the mass and that the Village offers only a public forum—one that would have been equally open to an opera or other secular event. All information in the Village's paper would lead an objective observer to conclude that the Village itself is the sponsor, or at least *a* sponsor. So the district judge was entitled to conclude that the Village has endorsed Christianity, if not Roman Catholicism in particular, and under *Allegheny County* it may not do so.

Doe wants an injunction against religious services at future festivals in Crestwood. We assume that the district judge will take evidence and make more detailed findings concerning the sponsorship of the mass and what, if anything, the Village has done (or could do) to demonstrate that it is providing a public forum but not endorsement. Nothing we say in this opinion prejudges that inquiry. On this slim record, however, the district judge's conclusions cannot be found clearly erroneous. The injunction against the mass scheduled for 4:00 p.m. on August 11, 1990, is

AFFIRMED.

COFFEY, *Circuit Judge*, dissenting. If I believed this case involved a government endorsement of Roman Catholicism as alleged by the plaintiff, I would join the majority's opinion. Even so, the celebration of the mass at issue would have fallen far short of demonstrating a government endorsement of religion; it was to be a distinctively *Italian* mass conducted in the national language of Italy for the purpose of portraying an Italian tradition in the context of a festival celebrating the Italian heritage of many of Crestwood's residents. The majority somehow approves

the trial court's reaching out into space to bring this constitutionally acceptable expression of Italian culture into the ambit of an Establishment Clause problem; there was no danger of this celebration of the mass being perceived by a *reasonable observer* as an attempt by the Village of Crestwood, Illinois to establish Roman Catholicism as the official religion. *See County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3103 (1989) ("the question is 'what viewers may fairly understand to be the purpose of the display.' ") (citation omitted); *Id.* at 3115 ("the constitutionality of [a display's] effect must also be judged according to the standard of a 'reasonable observer.' ") (opinion of Blackmun, J.); *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481, 755 (1986) ("No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief.") (O'Connor, J., concurring in part and concurring in the judgment).

Rather than preventing a government endorsement of religion, this suit, instead, is a clear attempt by the plaintiff to force the government to build an absolute wall of separation between church and state that would preclude the public expression of religious beliefs. Such an absolute wall is neither practical nor desirable, and it has no basis in history or modern First Amendment jurisprudence. As the Supreme Court noted in *Lynch v. Donnelly*, 465 U.S. 668 (1984),

> "The concept of a 'wall' of separation is a useful figure of speech probably deriving from views of Thomas Jefferson [expressed in his letter to the Danbury Baptist Association].[ ] The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But *the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.*
>
> "No significant segment of our society and no institution within it can exist in a vacuum or in total

> or absolute isolation from all the other parts, much less from government. '*It has never been thought either possible or desirable to enforce a regime of total separation.*' "

Id. at 673 (footnote and citation omitted) (emphasis added). The "wall" of separation theory was further criticized by then Justice Rehnquist in his *Wallace v. Jaffree*, 472 U.S. 38 (1985) dissent:

> "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. *Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States.* His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the amendments were passed by Congress. *He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.*"

Id. at 923. Thus Justice Rehnquist rejected the idea that Jefferson's Danbury Letter is controlling authority for the meaning of the First Amendment and looked instead to the views of James Madison, a leading member of the first Congress. After a thorough review of Madison's role in the adoption of the First Amendment, Justice Rehnquist concluded that Madison's view of the Religion Clauses is far more relevant to their meaning than is Jefferson's third-party interpretation given 14 years after the fact:

> "It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. *He did not see it as requiring neutrality*

> *on the part of government between religion and irreligion.*"

Id. at 98 (emphasis added). Further proof that Madison "did not see [the First Amendment] as requiring neutrality" is found in the fact that

> "as a member of the First Congress, [Madison] raised no recorded objection when that body on September 25, 1789, the same day it approved the First Amendment, petitioned President George Washington to issue a proclamation of a national day of prayer and thanksgiving; and, most importantly, as the nation's chief executive, Madison issued at least four presidential thanksgiving day proclamations."

D. Dreisbach, *Real Threat and Mere Shadow: Religious Liberty and the First Amendment* 111 (1987). In view of the actions of the first Congress on the same day it approved the First Amendment, the first Congress also saw the First Amendment as far less than an absolute wall of separation between the state and religion. As I have noted before,

> "It is clear from the historical evidence that the Establishment Clause was designed to prevent only the establishment of a *religion*, be it the Baptist faith, Lutheranism, Methodism, Episcopalianism, Judaism or Catholicism. It was never intended to prohibit government from taking actions, and government has not refrained from taking actions, which might have a minimal *religious* significance to persons of any faith or no faith, but do not 'in reality . . . establish a religion . . . or tend[ ] to do so.' *Lynch*, 465 U.S. at 678, 104 S.Ct. at 1362."

Mather v. Village of Mundelein, 864 F.2d 1291, 1295 (7th Cir. 1989) (Coffey, J., concurring). It should be abundantly clear to any *neutral* and *detached observer* that the authentic Italian mass scheduled as part of the "Touch of Italy" festival cannot be considered as "in reality . . . establish[ing] a religion . . . or tend[ing] to do so."

The issue before us is whether the inclusion of an ethnic religious service of 45 minutes' duration at a government-sponsored ethnic festival that spanned three days (72 hours) violates the Establishment Clause of the First Amendment. I would hold that it is entirely proper for the government to include the religious aspect of an ethnic culture when presenting the traditional aspects of that culture in a festival. Furthermore, under the facts before us, I would hold that the Village of Crestwood was not the sponsor of the authentic Italian mass enjoined by the district court. This Court should have granted the stay of the district judge's temporary restraining order.

I. VILLAGE ENDORSEMENT OF ROMAN CATHOLICISM

Lemon v. Kurtzman, 403 U.S. 602 (1971), still provides the relevant test for whether government statutes or practices that relate to religion are constitutional.

> "Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance or inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion."

Allegheny, 109 S. Ct. at 3100 (citing *Lemon v. Kurtzman*, 403 U.S. at 612-13). The majority advisedly addresses only the second prong of the *Lemon* test, that government action may "not advance nor inhibit religion in its principal or primary effect." Under the Supreme Court's interpretation of this test in *Allegheny*, the question is whether the government action "has the effect of endorsing religious beliefs." *Id.* at 3103.

I disagree that "[a] religious service under governmental auspices necessarily conveys the message of approval or endorsement." Majority Opinion at [A-5].[1] As in the crèche

[1] The majority cites *Gilfillan v. Philadelphia*, 637 F.2d 924 (3d Cir. 1980), for the proposition that "[p]revailing doctrine condemns

(Footnote continued on following page)

cases, government endorsement depends upon the context. *See County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 109 S. Ct. 3086 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984). No one would suggest that a government-sponsored funeral for a deceased president, such as the Roman Catholic funeral service for President John Fitzgerald Kennedy, could be perceived as the government's endorsement of the president's religion. On the contrary, anything less would be perceived as inappropriate government hostility toward that religion. The Roman Catholic mass that was performed at JFK's funeral was natural and entirely appropriate in the context of a funeral service for a deceased Roman Catholic president. Even if the government had not incurred any expenses in arranging for the mass, the trappings of a presidential funeral certainly conveys the message of government sponsorship of that funeral far more than does the Village of Crestwood's inclusion of a mass in an Italian festival.[2]

Likewise, an authentic Italian mass, recited in Italian, is natural and entirely appropriate in the context of the "Touch of Italy" festival, even if the mass were government sponsored (from the record I am convinced it was not, but I will temporarily concede government sponsorship for the sake of argument—*see infra*, section II). The "Touch of Italy" festival featured a weekend celebration of Italian culture, heritage and ethnicity. The Village had planned Italian entertainment with Italian music and comedy, Italian sporting events featuring bocce ball, Italian food and drink, and displays celebrating Italian culture. In view of the pervasive role of Roman Catholicism in

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[1] *continued*
such endorsement, even when no private party is taxed or coerced in any way." *Gilfillan* is inapposite to that proposition because in *Gilfillan* the City of Philadelphia had paid for the construction of an altar for a mass conducted by the pope in a public park.

[2] Military chaplains of various religious persuasions receive a government salary and conduct services regularly under government sponsorship, but that is not considered a government establishment of religion either.

Italian culture, a presentation of Italian culture that is purely secular would, according to a *reasonable person*, be considered most inaccurate and inappropriate. Indeed, the governmental exclusion of such a prominent part of Italian culture would, according to a reasonable mind, more likely be perceived as hostile to Roman Catholicism because "[a]lmost all Italians are Roman Catholic." *The New Columbia Encyclopedia*, 1380 (W. Harris & J. Levey ed. 1975). Including an authentic Italian mass in an Italian festival to provide an accurate portrayal of Italian culture, therefore, fails to communicate a "message of approval or endorsement."

In the context of the Italian festival, even if an authentic Italian mass were sponsored by the government, it would merely be an official acknowledgement of the religious aspect of Italian culture in a manner similar to traditional acknowledgments to the proper role of religions in American life. I have previously noted that such official acknowledgments of religion were declared constitutional by the Supreme Court in *Lynch v. Donnelly*:

> "In *Lynch* Chief Justice Burger, writing for the Court, observed that: 'There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.' 465 U.S. at 674, 104 S.Ct. at 1360. Examples of this historical acknowledgment were cited which included Executive Orders recognizing religiously grounded national holidays, the presence of religiously oriented work in publicly supported art galleries, and the printing on our currency of the national motto 'In God We Trust.' *Id.* at 675-77, 104 S.Ct. at 1360-61. To the examples cited by the Court, one could add the oaths taken by office-holders and witnesses in judicial proceedings, each of which recognize the existence of a deity, and the prayers of soldiers in combat or members of athletic teams prior to athletic contests in a public facility."

Mather v. Village of Mundelein, 864 F.2d at 1293-94 (7th Cir. 1989) (Coffey, J., concurring). I fail to understand

the challenge to the constitutionality of acknowledging the traditional role of Roman Catholicism in Italian culture when government may (and should) acknowledge the traditional role of religion in American culture in such a variety of ways.

In *Lynch v. Donnelly*, Chief Justice Burger, joined by Justices White, Powell, and then Justice Rehnquist, made the cogent observation that "*[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.*" *Lynch v. Donnelly*, 465 U.S. at 680 (emphasis added). The Court then went on to hold that

> "*[t]he District Court plainly erred by focusing almost exclusively on the crèche.* When viewed in the proper context of the Christmas Holiday season, it is apparent that . . . there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message."

Id. (emphasis added). The majority makes the same error here when *focusing exclusively on the nature of the mass*, as it does (traditional Eucharist, alter, cross and candles of the Roman Catholic church), rather than on how the authentic Italian mass relates to the expression of traditional Italian culture surrounding the mass. Given the predominately Roman Catholic tradition of Italy, the observance, for example, of a Baptist, or Episcopalian, or Jewish, or Presbyterian or Unitarian service in an authentic Italian festival would be misplaced regardless of the sponsor, for these religions are not integral parts of Italian culture. Indeed, they are so foreign to Italian culture that their presence at an Italian festival would raise a reasonable suspicion that the other religion was being promoted by the festival sponsors. In contrast, an authentic Italian mass merges and blends into the background of the other Italian aspects of Italian life, and thus the mass is an indispensable part of a complete tapestry.

Because of their mistaken focus on the nature of the mass, the majority in a sarcastic slap at a religious tradition concludes that "even a herd of reindeer and a forest of jumbo candy canes could not neuter a mass . . . ." Majority Opinion at [A-5-6]. Neither *Lynch* nor *Allegheny*, however, requires that the context of a government exhibit or action neutralize its religious character. Indeed, the *Lynch* majority specifically denied that it viewed the crèche as having only secular meaning:

> "Justice Brennan states that 'by focusing on the holiday "context" in which the nativity scene appears,' the Court 'seeks to explain away the clear religious import of the crèche' . . . and that it has equated the crèche with a Santa's house or reindeer . . . . Of course this is not true."

Lynch v. Donnelly, 465 U.S. at 684, n.12. In her *Lynch* concurrence, Justice O'Connor says that "[a]lthough the religious and indeed sectarian significance of the crèche, as the District Court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display . . . ." *Id.* at 692. Just as the "overall holiday setting change[d] what viewers may fairly understand to be the purpose of the display" in *Lynch*, the Italian festival setting changes what viewers may fairly understand to be the purpose of the authentic Italian mass said in Italian—the purpose of the mass was to portray a traditional part of Italian culture. And as in *Lynch*, "there is insufficient evidence to establish that the inclusion of the [mass] is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of [Roman Catholicism]." *Id.* at 680.

Allegheny seems to have changed the contextual emphasis from *Lynch*'s focus on a crèche's holiday setting to the specific physical setting of the crèche. The *Lynch* majority had found that a crèche gave no message of government advocacy of a particular religion when the crèche is in the "context of the Christmas Holiday season," *Lynch*

v. Donnelly, 465 U.S. at 680, but the *Allegheny* court found that a crèche standing alone had the effect of endorsing a religious message. *County of Allegheny*, 109 S. Ct. at 3103-04. *Allegheny* emphasizes that the physical surroundings of a display determines whether it has the effect of conveying the impression that the government endorses a particular religious view.[3]

The Supreme Court's seeming change in emphasis from the seasonal context to the specific physical context, however, falls far short of transforming the Italian mass at issue into a government endorsement of Roman Catholicism, as the trial judge, with the support of the majority, seems bent on accomplishing.[4] All of the physical surroundings of the proposed mass (Italian music, Italian comedy, Italian sporting events, Italian food and drink, and Italian cultural displays) attested the Italian nature of the ethnic festival. Thus, a 45-minute authentic Italian service would have merely been one very small segment of the community's primarily secular portrayal of Italian culture. Instead of the inclusion of an authentic Italian mass demonstrating government endorsement of Roman Catholicism, the government's prohibition of an exhibition of such a traditional part of Italian culture at an Italian festival conveys a loud and clear anti-religious message of disapproval of public expressions of religion. Why? I thought we were a nation "under God with liberty [to practice our own religion] and justice for all." Showing

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[3] Justice Blackmun stood apart from the other eight justices in his conclusion that a menorah standing beside a Christmas tree is drained of religious significance. *County of Allegheny*, 109 S. Ct. at 3114 (Blackmun, J.). Thus, *Allegheny* did not overturn the proposition, derivable from *Lynch*, that the religious significance of a government display need not be neutralized by its setting. *Lynch v. Donnelly*, 465 U.S. at 685 (Majority Opinion), 692 (O'Connor, J., concurring).

[4] Even if there were government sponsorship of the mass, the diminutive degree of sponsorship in this instance—an advertisement in the Village newspaper—fails to convey a message of Village endorsement of Roman Catholicism. See section II *infra*.

hostility toward religious expression is particularly inappropriate in this nation since one of the Pilgrims' primary interests in founding it was to gain religious freedom. Government conduct that has the effect of disapproving religious beliefs or showing hostility toward religion is every bit as constitutionally objectionable as conduct endorsing religious beliefs. *Cf. County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. at 3103.

The only way to ensure government neutrality toward religion is to allow all faiths whether in groups or as individuals to express their religious beliefs, or lack thereof, freely. Caesar Park in Crestwood, Illinois is a public forum that is open to all kinds of speech, including festivals celebrating the cultural heritage of ethnic groups, subject only to reasonable time and manner restrictions. The majority recognizes that Caesar Park is a public forum and that a religious practice or event may not be excluded from such a forum on the basis of the religious content of the speech involved. *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) ("In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the [government] . . . must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."); *Fowler v. Rhode Island*, 345 U.S. 67 (1953). But the majority also states that because the Village is sponsoring the Italian festival, the festival too must be open to all types of religious services in order for the celebration of the authentic Italian mass to be permissible. The majority reasons that if the mass were sponsored by a private organization and the festival were open to other private groups (no evidence was presented to demonstrate that the Village prohibited other private groups from making presentations on the festival grounds), the mass would pass constitutional muster. This reasoning is rather specious because, as I noted above, nontraditional religions would be out of place in an Italian festival (just as Irish or Polish music or dances would be out of place at a Chanukah celebration). It is the park

(i.e. the public forum) that must be open to all kinds of speech. Once the city has decided to use the park for a specific purpose, such as an ethnic festival, all activities that are inconsistent with the purpose of the festival may properly be excluded, and all activities that further the secular purpose of the festival may properly be included. In this instance, the secular purpose of conveying a broad panorama of Italian culture is enhanced by including an authentic Italian mass. The remote possibility that the Roman Catholic church may receive some incidental benefit from having an authentic mass included in a festival for the purpose of portraying the religious heritage of the ethnic culture fails to implicate the constitution. In *Board of Education of Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990), Justice O'Connor recently observed that "although incidental benefits accrued to religious groups who used university facilities [in *Widmar*], this result did not amount to an establishment of religion." *Id.* at 2371 (plurality opinion). Nor does the inclusion of an ethnic religious service in the context of a celebration of the ethnic cultural heritage "confer any imprimatur of state approval on religious sects or practices" (*Widmar*, 454 U.S. at 274) because the average citizen will perceive such services as part of the expression of the heritage of the ethnic culture.

> "Indeed, the message is one of neutrality rather than endorsement; *if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.* 'The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.' *McDaniel v. Paty*, 435 U.S. 618, 641, 98 S.Ct. 1322, 1335, 55 L.Ed.2d 593 (1978) (BRENNAN, J., concurring in judgment)."

Mergens, 110 S. Ct. at 2371 (plurality opinion) (emphasis added). The Village of Crestwood has opened Caesar Park

to the portrayal of a broad variety of the secular aspects of the Italian heritage and culture at the Village's expense. The refusal to allow the inclusion of a portrayal of the traditional Italian religion—a mass said in Italian by an Italian-speaking priest—at the expense of private parties (the Crestwood Women's Club) certainly "demonstrate[s] not neutrality but hostility toward religion."

Last year in *Mather v. Village of Mundelein*, 864 F.2d 1291 (7th Cir. 1989), we recognized that *the constitution does not require the government to suppress the religious dimension of holidays such as Christmas that have both secular and religious aspects.*

> "The Constitution does not simultaneously allow the state to declare a holiday in honor of this religious event [Christmas] and command it to pretend that the day has only secular meaning, or allow it to sponsor a display but compel it to hold the icons at a symbolic arm's length by moving them to the other side of the street. If there may be a holiday, and a display, at all, there is no constitutional virtue in the ten-foot pole. *Governments display the appropriate symbols for other occasions; the holiday celebrating the life of Rev. Martin Luther King, Jr., brings readings from his sermons, unabashedly sectarian in nature. When the government speaks but does not compel others to worship or penalize those with different views, there is no serious threat to religious freedoms.*"

864 F.2d at 1298 (Easterbrook, J., concurring). Similarly, if a government entity may promote the celebration of an ethnic culture that has predominate religious aspects, the constitution does not mandate that the government pretend the ethnic culture has only secular dimensions. *The government may constitutionally recognize the religious aspects along with the secular.* Indeed, in the same manner that "[g]overnments [may] display the appropriate symbols for other occasions," the Village may allow the celebration of a Catholic mass as a symbol of traditional

Italian culture. The plaintiff argues in his Response to Appellants' Emergency Motion for a Stay Pending Appeal that the mass could be moved to a church rather than be canceled. Just as the constitution does not require "moving [religious icons] to the other side of the street" from a government Christmas display, neither does it require that the recognition of an ethnic culture's religion be isolated from a government-sponsored celebration of the cultural heritage. Of course all crèches could be placed on church property, and the authentic Italian mass could always be held in a Roman Catholic church (where it was forced to relocate this time). But just as a Christmas crèche may occupy a place on government property in the context of a general Christmas display, an authentic Italian mass may be conducted on public property in the context of an Italian festival without implying governmental endorsement of the Italian religion to a *reasonable, unbiased mind.* Furthermore, presenting the religious as well as the secular aspects of the Italian culture is analogous to the government's presentation of Martin Luther King, Jr.'s religious sermons along with his secular speeches. No one would suggest that a balanced presentation of Martin Luther King, Jr.'s speeches demonstrates a governmental endorsement of his religious beliefs, and, indeed, a balanced presentation of a person's views or heritage cannot constitute governmental endorsement.[5] As Chief Justice Burger observed in *Lynch*,

> "In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.

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[5] The majority somehow finds the same balanced presentation of Italian culture unconstitutional. I fail to comprehend how the majority can on one hand make such a rigid application of the Establishment Clause to the Village's festival and then shift gears and go in reverse and view the celebration of Martin Luther King, Jr.'s birthday in a rational, unbiased, reasonable manner.

> "Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct *to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.*"

Lynch v. Donnelly, 465 U.S. at 678 (emphasis added). An authentic Italian mass in the context of an Italian festival could not possibly be construed by a *reasonable observer* as tending "in reality [to] establish[ ] a religion or religious faith" or to constitute a governmental endorsement of religious beliefs. *See County of Allegheny*, 109 S. Ct. at 3103.

The authentic Italian mass that was to have been conducted at the "Touch of Italy" festival easily meets the other two prongs of the *Lemon* test. The first prong of the test is that the activity must have a secular purpose. The test does not require that the practice have an *exclusively* secular purpose, only a secular purpose. *See Lynch v. Donnelly*, 465 U.S. at 681, n.6. The purpose of the Italian mass was to complete the picture of Italian culture presented by the primarily secular Italian fest as well as to draw additional patrons to the "Touch of Italy" festival.[6] Hence, it passes this test of having a secular purpose. The final prong of the *Lemon* test, the avoidance of excessive government entanglement is likewise easily met. In *Lemon* there would have been "comprehensive, discriminating, and continuing state surveillance" of the religious content of the education in a private school. *Lemon v. Kurtzman*, 403 U.S. at 619. In contrast, the only government involvement in the authentic Italian mass

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[6] Roman Catholics are required to attend mass either late on Saturday afternoon or evening or on Sunday. *1990 Catholic Almanac* 219 (F. Foy & R. Avato ed.). Thus the celebration of an authentic Italian mass at 4:00 p.m. on Saturday afternoon was an accommodation to draw a larger crowd to the Saturday night festivities.

was an advertisement, included within an advertisement for the rest of the festival, in the Village newspaper, and the recruitment of an Italian-speaking priest by a Village employee.[7] All other aspects of the mass were planned by the Crestwood Women's Club, and all materials and expenses incurred for the celebration of the mass were paid for by the Women's Club, without the expenditure of any public funds. Thus, there is no continuing involvement or entanglement like there was in *Lemon*.

II. VILLAGE SPONSORSHIP OF THE ITALIAN MASS

The foregoing has assumed for the sake of argument a point I do not concede, Crestwood's sponsorship of the authentic Italian mass. The district judge based his findings of Village sponsorship of the mass solely on the publicity provided in the Crestwood Adviser, the Village newspaper. He found that the

> "Village's explicit and unambiguous sponsorship of a sectarian religious service as part of a Village-sponsored festival has an impermissible religious effect. . . . Here, not only has Village promoted the Italian fest as a Village-sponsored event, but it also has *singled out* the mass from the other festival activities and invited people to 'Join Us' for that service in an indisputably official government publication, the *Crestwood Adviser*. This message conveyed in the *Adviser* closely identifies Village with the practices of a particular sect in the Christian religion, and clearly has an impermissible religious effect."

TRO at 7-8 (emphasis added). This finding gives far too much emphasis to a small block of advertisement less than three-quarters of an inch by one and a half inch in the

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[7] An Italian-speaking priest celebrated the service in order that it might truly convey the traditional Italian flavor of the event. Thus, Crestwood had a legitimate interest in obtaining the services of one who could communicate in the language of the Italians.

context of what appears to have been more than a half-page promotion of the festival. The block advertising the "Traditional Italian Mass" was the smallest advertising block on the page. Furthermore, the ad does not "single out" the mass for a special invitation. The advertisement also invited the public to "Join Us for 3 Evenings of Superb Entertainment" in the headline advertising the festival, and the advertisement for a free concert said, "You are invited to be our distinguished guest . . . ." Thus, the Village was promoting the festival, not one single aspect of it, and the advertisement fails to "closely identif[y] Village with the practices of a particular sect in the Christian religion." The district judge, interpreting the same record before us, also somehow found that the Village had "prominently featured and promoted the Roman Catholic mass, in an explicit and unambiguous manner" because the newspaper carried a one-column headline (to promote Saturday night attendance) stating "Italian Mass to be celebrated at our Italian Fest."[8] TRO at 6. The description below the headline occupied only five lines of ordinary news type, apparently out of a full page (the complaint failed to give the page number or the context of the news report), and the report was not on the page advertising the festival. This is far from an "explicit and unambiguous sponsorship of a sectarian religious service" and far from the government's having "clearly singled out the religious aspect of a government event or display" for government promotion. TRO at 7-8. Indeed, at the hearing the Village alleged, and the plaintiff did not deny, that the mass was entirely planned and paid for by the Crestwood Women's Club:

> [VILLAGE ATTORNEY]: "Judge, the Crestwood Women's Club . . . has principal responsibility over the Mass. . . .
>
> "All of the materials used for the mass are being donated by parishioners, not

[8] I note that most writers create their own headlines for their articles.

> City donations. That will include a table, bunting about the table, glasses, dishes and so forth, all service related and those are all coming from members of the Women's Club none from the City or Village o[f] Crestwood.
>
> * * *
>
> THE COURT: "So you are saying there is no incremental cost?
>
> [VILLAGE ATTORNEY]: "That's right."

Nonetheless, the district judge, straining to support his TRO, concluded that "it is really not possible to reconcile that position [Women's Club sponsorship instead of Village sponsorship] with Village's own characterizations in its own publication . . . ."[9] TRO at 6, n.4. Thus it is obvious that in the tailoring of his opinion the trial judge has deliberately reached out and magnified the Village's advertisement of the authentic Italian mass in an attempt to justify his TRO. I would hold that the district court's finding of Village sponsorship of the authentic Italian mass was clearly erroneous.

III. TEMPORARY RESTRAINING ORDER

This case is before us on an Emergency Motion For a Stay Pending Appeal, a motion to suspend the district court's TRO that is now moot as it applies to the 1990 Italian Fest. Under the circumstances of this case, the stay should have been granted because the plaintiff failed to carry the burden of establishing the requisite factors we articulated in *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380 (7th Cir. 1984). Those factors are (1) "irreparable harm if the injunction is denied"; (2) "no adequate remedy at law"; (3) the plaintiff's harm without

[9] Thus, while the majority contemplates the district court receiving further evidence regarding sponsorship of the mass, it seems like an exercise in futility, as this district judge has already prejudged the outcome of the additional evidence.

an injunction would be greater than defendant's harm with it; (4) the "plaintiff has a reasonable likelihood of success on the merits"; and (5) "the injunction will not harm the public interest." *Id.* at 382-83. I would hold that the plaintiff failed to sustain his burden of proof on each of these factors, as he had no ascertainable harm to remedy at equity or law, the injunction harmed the residents of Crestwood as well as the public interest, and the plaintiff has no likelihood of achieving his ultimate goal of preventing future religious celebrations regardless of who sponsors them.

A. Irreparable Harm and No Adequate Remedy at Law

The trial court relied upon *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986), for finding that the plaintiff would have suffered an irreparable harm absent the TRO. The plaintiff's complaint alleged that "[h]e will avoid use of Caesar Park while the mass is being conducted there. By the Village's sponsorship of this mass, plaintiff has been injured in that his right to be free from a government body's establishment and endorsement of religion has been violated." The district judge found the complaint sufficient and even failed to require the plaintiff to allege that there was some activity in which he would participate if the mass were enjoined. Indeed, since the service was to take place before the major events of the evening, it is highly questionable whether there was any activity of which the plaintiff would have been deprived at that particular time even if he had avoided the park because of the mass. Thus the plaintiff's purported injury is even less than that alleged in *City of St. Charles*. There the plaintiff alleged that she had to drive out of her way every day of the Christmas season in order to avoid looking at a lighted cross. Such an injury is quite esoteric, but the one alleged here is even more so. The plaintiff is suing because there is a short 45-minute event in a three-day festival, in which he did not wish to participate.

Only in Establishment Clause litigation before a presiding judge with a sympathetic ear could such a nebulous injury confer standing. All other areas of law require a far more concrete injury even to get into court, not to mention the level of injury required for a TRO. That such a complaint could be taken seriously by a court demonstrates the wisdom of Justice Kennedy's *Allegheny* dissent in which he described prior Supreme Court cases as providing

> "two limiting principles: Government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a state religion or religious faith, or tends to do so.' "

109 S. Ct. at 3136 (quoting *Lynch v. Donnelly*, 465 U.S. at 678). Applying this formulation to plaintiff's complaint, it is clear that no injury could be found in his allegation that "[h]e will avoid use of Caesar Park while the mass is being conducted there."

The plaintiff has failed to demonstrate irreparable harm. His alleged harm is at most *de minimis*, and it is largely, if not entirely, contrived and imaginary. Rather than using the First Amendment as a shield to protect himself against a potential injury from the government, the plaintiff is attempting to use the First Amendment as a sword to coerce thousands of Crestwood's residents to conform to his own beliefs[10]—he appears to argue that any public acknowledgement of religion is an unacceptable evil because the object of this suit is to enjoin the holding of an authentic Italian mass at the Italian festival, not to

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[10] As in *Mather v. Village of Mundelein*, 864 F.2d at 1297 (7th Cir. 1989) (Coffey, J., concurring), the plaintiff "is not interested in the expression of recognition of [his] own religious viewpoint, but rather in the suppression of recognition of another religious viewpoint." In *Mather* we appropriately refused to allow the plaintiff to use this court to suppress the religious views of others, and we should have done so here.

prevent the Village from sponsoring the mass. While the district court's TRO focused on the Village advertisement of the mass, it is clear from the complaint that merely eliminating the advertisement would fail to satisfy the plaintiff. It is the religious practice that offends him.

The majority asserts that "[b]ut for the mass, the tent [where the mass was scheduled to be held] would be used as a beer garden between the opening (3:00 p.m. Saturday) and the first concert of the evening, so Doe suffers the same kind of injury as the plaintiff in *ACLU v. City of St. Charles*, 794 F.2d 265, 267-69 (7th Cir. 1986), and has standing." Majority at [A-4].[11] This assertion overlooks the possibility, which the majority recognizes in its conclusion, that a mass at the festival would not convey Village endorsement of religion if there were no Village sponsorship. It would be disingenuous to suggest that the plaintiff would avoid Caesar Park during the mass if it were sponsored by the government, but attend the festival during the mass if it were sponsored by private parties.[12] If a mass may be held at a festival that provides an open forum, the only possible harm that could come to the plaintiff from an authentic Italian mass would be government sponsorship of the mass. Thus, even if there were some minute harm to the plaintiff from the Village's advertisement of the authentic Italian mass, the harm was complete when the *Crestwood Adviser* was distributed. There was no cognizable irreparable harm to enjoin because any further harm would be from private parties exercising their own religious liberty and freedom of

[11] The plaintiff nowhere alleges that the tent where the mass was scheduled was the only "beer garden" available at the festival or that the plaintiff would have been present at the "beer garden" if the mass did not occur.

[12] I mention this potential difference not to minimize the distinction between an injury inflicted by the government and an injury inflicted by a private party, but to emphasize the amorphous nature of the plaintiff's alleged injury. The plaintiff would be drummed out of court in short order if he alleged such an innocuous injury against a private party.

speech. As Justice O'Connor recently noted in her plurality opinion in *Mergens*, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 110 S. Ct. at 2372 (emphasis in original). The government "speech" in advertising the authentic Italian mass failed to constitute an endorsement of the mass; thus there was no Establishment Clause violation. Conversely, the injunction restraining the mass prevented the exercise of "private speech endorsing religion," thus the injunction violated the Free Speech and Free Exercise Clauses.

The esoteric nature of the plaintiff's alleged harm highlights the convoluted state of Establishment Clause jurisprudence at this time. It is unsurprising, however, that an Establishment Clause doctrine that recognizes a harm in the absence of government coercion, interference with or suppression of religion results in a jurisprudence incapable of objective analysis. Giving judicial cognizance to amorphous harms like the one alleged in the instant complaint stands the First Amendment on its head. As Justice Kennedy noted in his *Allegheny* dissent,

> "The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and Free Exercise Clauses. Barring all attempts to aid religion through government coercion goes far toward attainment of this object."

County of Allegheny, 109 S. Ct. at 3136. Even "[w]hen the government speaks but does not compel others to worship or penalize those with different views, there is no serious threat to religious freedoms." *Mather v. Village of Mundelein*, 864 F.2d at 1298 (Easterbrook, J., concurring). I believe it is time for the judiciary to rethink our First Amendment jurisprudence and return to requiring harms capable of concrete definition and objective analysis before claims are recognized, as we do in every other area of law. In

this way we would protect religious liberty as was the original intent of the framers of the constitution. Instead, the trial judge found, and now the majority accepts, a supposed harm in a quagmire of quicksand as they trip through an evidentiary vacuum of speculation to create a specious legal argument. Taking cognizance of such a spurious harm is a giant step toward building an absolute wall between church and state, an edifice that has never before existed in the United States.

> "No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. 'It has never been thought either possible or desirable to enforce a regime of total separation.' . . . Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. . . . Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause. . . . Indeed, we have observed, such hostility would bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.' "

Lynch v. Donnelly, 465 U.S. at 673. Characterizing the plaintiff's complaint as a harm demonstrates at least "callous indifference" to the religious liberty of the Crestwood Women's Club who desired to sponsor the mass; acknowledging it as an "irreparable harm" adequate to merit a TRO demonstrates outright hostility to the Italians' national religion.

Doe alleges he would be left with no adequate remedy at law for his "irreparable harm" if the TRO were denied because " 'an erosion of religious liberties' cannot be rectified by awarding money damages at a later date." The plaintiff's motion for TRO at 9 (quoting *ACLU v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986)). Since the plaintiff has no realistic harm and no erosion of his

religious liberties (he was neither forced nor coerced to attend the mass), of course there is no remedy at law. The presence of an authentic Italian mass in the context of Italian culture cannot be "an erosion of [the plaintiff's] religious liberties." Indeed, as I mentioned above, the plaintiff is in effect, through the Courts, suppressing the religious liberties of others rather than exercising his own. Such suppression is as inappropriate here as it would have been in *Mather v. Village of Mundelein*, 864 F.2d 1291 (7th Cir. 1989) where the plaintiff was attempting to suppress the display of religious symbols in a Christmas display:

> "Although respect for freedom of religious conscience and religious tolerance certainly require that religious believers refrain from using governmental means to injure non-believers and believers of other religious creeds, in light of government's historical recognition of the religious beliefs of its citizenry, these values must also be understood to require that a non-believer or a believer of another religious creed not use the courts to exclude the symbols a religious believer holds dear from a holiday display."

Id. at 1296 (Coffey, J., concurring). In the future, we should follow the constitutional mandate and refuse to allow those who hold traditional religious beliefs and practices in contempt to use our Court as a vehicle for the suppression of religious practices.

B. Balance of Harms

The plaintiff contends that his putative injury outweighs that of the Village because the Village has no legal harm. If the Village is viewed as an entity apart from its people, that is true, and the balance of harms would always go against the Village in any TRO motion. But that would be equivalent to viewing a corporation as an entity distinct from the shareholders. Such a perspective is not viable in corporate law, and we should not view the Village as separate from its residents here. A village is an

entity of the government that is the people, not a building with four walls, a foundation and a plot of grass. When the alleged harm to the plaintiff is weighed against the harm to the residents of Crestwood, the scales swing in favor of the Village and its people for a number of reasons. First, the injunction prohibits an accurate portrayal of Italian culture. The role of Roman Catholicism in Italian life and culture cannot be gainsaid, and a portrayal of the culture without the religious aspect is inaccurate. Second, the authentic Italian mass was a method of attracting patrons to the festival because attending that mass would fulfill the patrons' weekly obligation to attend a weekend mass. While the mass itself was free, the additional people attracted by the mass would contribute to the income of the festival merchants and, I assume, would inure to the benefit of the Village coffers. Third, canceling the mass at the last minute endangered creating political divisiveness because many Roman Catholics would have attended the festival to fulfill their weekly obligation of attending mass, and they would have been inconvenienced and probably frustrated by the cancelation. Finally, an injunction against a presentation of an ethnic group's traditional religious observance in a portrayal of that group's culture sends a clear message that the courts disapprove of the public practice of religion under the ever-expanding umbrella of the Establishment Clause. The Italian residents of Crestwood cannot help but feel that the Courts are hostile to their beliefs in prohibiting their free exercise of their religion when their authentic Italian mass is enjoined.[13] Thus, the TRO clearly inflicts a greater

[13] The prohibition of the authentic Italian mass clearly demonstrates the same kind of government hostility to religion that would have been demonstrated by preventing the inclusion of a crèche in the Christmas display at issue in *Mather*:

> "Court ordered exclusion of a religious symbol from a display or the prevention of erection of any display if it incorporates religious themes leaves adherents of any and all religions respecting the deity with the same feeling that government is hostile to their religious beliefs as the non-adherent may

(Footnote continued on following page)

harm on the Village residents who would have benefited from the mass than the mass would have imposed on the plaintiff.

C. Reasonable Likelihood of Success

The plaintiff has failed to demonstrate "a reasonable likelihood of success on the merits" of his request for a permanent injunction against further masses at festivals portraying ethnic cultures. As recited above, the authentic Italian mass scheduled during the "Touch of Italy" festival passes the *Lemon* test. Thus, at most the plaintiff has shown a possibility of succeeding in preventing government advertisement of such ethnic portrayals of religious beliefs in the future, but even that limited possibility of success may fail after a full hearing. I am convinced that a fully developed record will demonstrate that the Village's assertion that there was no government sponsorship of the authentic Italian mass was accurate and valid. If so, the "valet service" (4:30 p.m. Friday afternoon hearing) from the district judge in granting the plaintiff's TRO motion on an inadequate record at the eleventh hour deprives the defendants of their constitutional rights to free speech and free exercise of religion. Because the injunction against the mass harmed the defendants and the mass itself would not harm the plaintiff, the plaintiff is without a "reasonable likelihood of success on the merits" of his claim.

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[13] *continued*

feel if the alleged religious symbol is included. The constitutional values of respect for freedom of religious conscience and of religious tolerance, which Justice Stevens recognized in [*Wallace v.*] *Jaffree*[, 472 U.S. 38, 52-54 (1985)], understood in their true senses, mean that we must demonstrate consideration for others' beliefs and feelings in religious matters even when they are not the same as ours."

Mather v. Village of Mundelein, 864 F.2d at 1296-97 (Coffey, J., concurring).

D. Harm to the Public Interest

Under the *Roland Machinery* "public interest" factor, it is the interest of persons other than the parties to the suit that must be considered and protected. In the instant case, it is clearly in the public interest to provide an accurate picture of Italian culture when celebrating that culture in a classic Italian festival entitled a "Touch of Italy." Absent the inclusion of the religious aspect of Italian culture, non-Italians attending the festival would get a false concept of what traditional Italian family life and culture is, and Italian-American children whose parents no longer follow the traditional Italian religion will receive a skewered picture of their heritage. Furthermore, prohibiting the expression of so integral a part of Italian culture as their traditional religious practice demonstrates a clear government hostility not only toward the traditional Italian religion but also toward public displays of any religious beliefs. Our nation was built on the principle of "one nation under God with liberty and justice for all," including liberty and justice for those who adhere to a belief in a Supreme Being as well as those who have no beliefs. Thus while the government may not show favoritism to religion, neither may it show hostility: "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or *disapproval* of religion." *Lynch v. Donnelly*, 465 U.S. at 692 (O'Connor, J., concurring) (emphasis added). The district court's speedy granting of the TRO on an insufficient record harmed the public interest by suppressing the expression of the traditional Italian religious practice and by demonstrating government hostility toward public displays of religious beliefs. The granting of the TRO should have been stayed.[14]

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[14] I note one further issue that should have militated against upholding the district court's TRO, the issue of timing. The plaintiff filed his motion for a TRO along with his complaint on August 10, 1990, the day before the mass was scheduled. At the hearing, the plaintiff's attorney alleged that the timing was unavoidable

(Footnote continued on following page)

[14] *continued*
because (1) Doe first contacted his attorney Tuesday, August 7, (2) Doe's attorney contacted the Village attorney Wednesday, August 8, (3) at 9:30 p.m. on August 9, the Village attorney notified Doe's attorney that the Village planned to retain the mass as part of the program, and (4) Doe filed suit the next morning. This sequence of events resulted in a hearing at 4:45 p.m. Friday afternoon, August 10, with a TRO being issued at 5:30 p.m. followed by an immediate emergency appeal, which necessitated our deciding the appeal on Saturday, August 11. Given the fact that ethnic festivals in the Village have included masses in the traditional language of the celebrated culture for six years, the last-minute timing of this suit may well have been deliberately orchestrated in order to prevent full consideration of the issues involved. Upholding the instant TRO encourages such orchestration. I believe it would be in the best interests of proper court management and the preservation of precious judicial time to give all parties sufficient opportunity to present a well-researched and well-prepared argument and thus give the court sufficient opportunity to make a well-reasoned judgment. I would favor rejecting last-minute motions for a TRO or preliminary injunction unless unique circumstances make such a last-minute motion necessary—especially when as here the question of irreparable harm does not exist. *Cf. Nassau Boulevard Shell Service Station, Inc. v. Shell Oil Co.*, 869 F.2d 23, 24 (2d Cir. 1989) ("We believe that in the future such eleventh hour motions for preliminary relief should ordinarily be denied in this court and in district courts."). The instant case is not a true emergency such as arises when there is a need for immediate surgery to save a life, but the insurance agency has refused to cover it because the procedure is considered experimental, or a crucial blood transfusion for an infant child is rejected by a parent or guardian on religious grounds. I do not consider waiting until the eleventh hour to contact an attorney adequate justification for last-minute temporary relief. The plaintiff alleges that he has resided in the Village of Crestwood for nearly 17 years. Thus, the ethnic mass did not first come to his attention on August 7, 1990, and as in *Nassau*, the plaintiff "could have moved for relief months before it did and given the district court and us an opportunity to resolve the outstanding legal issues well before the [festival] date." *Id.* at 24. I have grave doubt that the plaintiff's timing and need for a TRO was not contrived and orchestrated, and thus the motion should have been denied.

IV. CONCLUSION

This case is dealing with the government's suppression of religion rather than the government establishment of religion. The plaintiff is concerned only with attempting to suppress the religious practices of others, not the government's suppression of his own religious liberty. The Establishment Clause of the First Amendment was never intended to be used as a sword to suppress and stifle the religious practices or beliefs of American citizens. Rather, it was intended as a protection *against* the government suppression of the free exercise of religious beliefs. The plaintiff has turned the Establishment Clause shield, which was designed to protect his religious beliefs, into a lethal instrument used merely for the purpose of attacking other religious beliefs. In his TRO, the district judge recognized the importance of Doe's religious liberties. But he assumed, somehow, that the presentation of an authentic Italian mass in the context of the presentation of Italian culture at the "Touch of Italy" festival would impair those religious liberties. The district judge's assumption is based on a faulty syllogism. The syllogism goes something like this: (a) The plaintiff has a constitutional right to religious liberty; (b) the government may not impair the plaintiff's religious liberty; (c) exposing the plaintiff to the religious practices and beliefs in the presentation of an authentic Italian mass at a government-sponsored Italian festival impairs the plaintiff's religious liberty. Absent government taxation to support the Italian mass or government coercion to force someone to participate at the mass, or government prevention of the plaintiff's expression of his own religious beliefs, the last proposition is faulty. It is impossible to impair one's religious belief without somehow preventing him from expressing it. The district judge, now with the majority's approval, has inexplicably confused freedom *of* religion for freedom *from* religion. Our nation should encourage its citizens to express their religious beliefs or lack thereof, within constitutional limits whether it be through Judaism, Christianity or any other belief that emphasizes the importance of moral values.

What better vehicle do we have to strengthen the eroding moral fibre of this nation, which has been sapped of its very vitality by the increased emphasis in public education and all facets of life on materialism, relativism and on unhealthy secularism? We should strive for a re-birth of morality and human responsibility (with every right there is a corresponding obligation) in a concerted effort through public education, the pulpit, the bema, the news media, radio and television programs. What better course can we follow to effectively address the escalating national cancers of child abuse (2 million cases a year), drug abuse (4 million heavy drug users[15]), teen pregnancies (1 million per year), unwed mothers (1/4 of all births), divorce (1 out of 2 marriages) and murder (one every 24 minutes)? *No great nation has ever maintained its position as a world power without a strong moral foundation. See* 1 A. Toynbee, *A Study of History* (abr. ed. 1947). Let us not contrive ways to make it difficult for people to practice the religion of their choice.

The granting of the TRO should have been stayed, and the plaintiff's complaint should have been dismissed for failure to state a claim upon which relief can be granted. I dissent.

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[15] Estimate of William Bennett, Director of the federal anti-drug program.

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
January 7, 1991

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

JOHN DOE,

Plaintiff-Appellee,

No. 90-2735 v.

VILLAGE OF CRESTWOOD, ILLINOIS,
and CHESTER STRANCZEK, Mayor
of the Village of Crestwood,
in his official capacity,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 4655—Milton I. Shadur, Judge.

ORDER

Defendants-Appellants Village of Crestwood and Chester Stranczek filed a petition for rehearing and suggestion of rehearing in banc on November 9, 1990. A majority of the panel voted to deny the petition for rehearing. A vote of the active members of the court was requested, and a majority of the active judges have voted to deny a rehearing in banc. Circuit Judges Wood, Coffey, Flaum, Manion and Kanne voted to grant rehearing in banc. The petition for rehearing is therefore DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOE,

Plaintiff,

v.

VILLAGE OF CRESTWOOD, ILLINOIS,
and CHESTER STRANCZEK, Mayor
of the Village of Crestwood,
in his official capacity.

Defendants.

No. 90 C 4655—Judge Shadur

TEMPORARY RESTRAINING ORDER

On August 10, 1990 plaintiff John Doe ("Doe") filed his Verified Complaint for declaratory and injunctive relief against the Village of Crestwood and its Mayor, Chester Stranczek, in his official capacity (collectively "Village"), seeking to enjoin the defendants from conducting or allowing to be conducted a Roman Catholic mass on Village property as a part of a Village-sponsored "A Touch of Italy" festival.[1] Doe contends that Village's express spon-

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[1] Plaintiff's complaint seeks preliminary and permanent injunctive relief applicable to the conducting of masses at all Village-sponsored events on Village property (*see* Plaintiff's Verified Complaint at para. 20B). However, the only matter before the Court at this time is the Plaintiff's Motion for Temporary Restraining Order restraining Village from conducting or allowing to be conducted the Village-sponsored Roman Catholic mass scheduled for August 11, 1990.

sorship of a sectarian religious service is in violation of the Establishment Clause of the First Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment.[2]

Simultaneously with the filing of his Complaint, Doe filed a Motion for Temporary Restraining Order, accompanied by a supporting memorandum of law, the underlying facts being asserted in the Verified Complaint.[3]

Defendants' counsel, having received oral notice of plaintiff's intention to pursue temporary relief, and having been served by telecopy transmission with all of Doe's papers, filed their Memorandum in Opposition to Plaintiff's Motion for Injunctive Relief in open court on the afternoon of August 10, 1990, at the time this matter was set to be heard. No evidentiary materials were submitted by defendants.

At approximately 4:45 p.m., this Court held a hearing at which it heard the arguments of counsel concerning plaintiff's motion for temporary restraining order.

This Court has given full consideration to all pleadings filed to this date, to arguments of counsel for all the parties and to relevant authorities. In further support of this Order, this Court incorporates fully herein the findings and conclusions contained in the Court's oral ruling from

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[2] Of course Doe's claim against a municipality and its officials really sounds in the Fourteenth Amendment, which has been held to incorporate the Bill of Rights guaranties. This order nevertheless follows the universal (though technically imprecise) practice of referring to the underlying Bill of Rights provision, the First Amendment.

[3] Doe also filed a Motion to Proceed Anonymously and a Motion for Leave to File Suppressed Document Instanter. Those motions are not dealt with herein.

the bench granting Plaintiff's Motion for Temporary Restraining Order. In accordance with Fed. R. Civ. P. ("Rule") 52(a) and 65(d), IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. This Court has subject matter jurisdiction of this case under 28 U.S.C. §§ 1331 and 1343.

2. This Court's exercise of its discretion in reviewing the request for preliminary relief is guided by the five factors identified by the Court of Appeals in *Roland Machinery Corp. v. Dresser Industries, Inc.*, 749 F.2d 380 (7th Cir. 1984). This Court finds that issuance of a Temporary Restraining Order is necessary and appropriate because:

a. *Plaintiff will suffer irreparable harm if a temporary restraining order is not issued.* This is a typical equity case where the only relief requested by Doe is injunctive and related declaratory relief. No damages are requested from any defendant. Because the Village-sponsored Roman Catholic mass is scheduled to be held on August 11, 1990 at 4 p.m., by definition Doe must obtain the relief sought in his Motion for Temporary Restraining Order before that date. Any relief given after that date will be of no benefit to Doe. Doe cannot easily wait until the end of trial to get that relief and will suffer irreparable harm in the interim that cannot be prevented or fully rectified by a final judgment after trial. Doe's rights of religious liberty are extremely important First Amendment rights, and even minimal periods of loss of such rights unquestionably constitutes irreparable injury. (*Elrod v. Burns*, 427 U.S. 347, 373-374 (1976)). Our Court of Appeals has found injuries

suffered as a result of unconstitutional establishment of religion to constitute irreparable harm for purposes of granting preliminary injunctive relief, (*ACLU v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986) (holding that plaintiff's injury in challenging municipality's display of large, lighted cross was irreparable harm, since "an erosion of religious liberties" cannot be rectified by awarding money damages at a later date)), *cert. denied*, 479 U.S. 961 (1987).

b. *Plaintiff has no adequate remedy at law.* *Roland Machinery* establishes that a plaintiff has no adequate remedy at law if damages at the end of trial will be seriously deficient as a remedy for the harm suffered by plaintiff (749 F.2d at 386). As already stated, Doe has not requested an award of damages, but is instead seeking injunctive and declaratory relief. Damages would be difficult, if not impossible, to calculate even if they were requested. No amount of damages at the end of trial would be adequate to compensate Doe if the Roman Catholic mass at the Village-sponsored festival were to go forward and his religious liberties were consequently impaired.

c. *Plaintiff has demonstrated a reasonable likelihood of success on the merits.* This Court finds that Doe's likelihood of success on the merits in this case is very high. While under *Roland Machinery* plaintiff must show a "reasonable likelihood" of success on the merits, here plaintiff's showing is much more substantial.

Cases claiming Establishment Clause violations are analyzed under the three-prong test of *Lemon*

v. Kurtzman, 403 U.S. 602 (1971). Government action violates the clause if it has an impermissible religious purpose, a religious effect, or if it results in excessive entanglement of government with religion. Only one prong need be violated for government action to be unconstitutional. (*id.*, 403 U.S. at 612; *County of Allegheny v. American Civil Liberties Union*, ____ U.S. ____, 109 S. Ct. 3086, 3100 (1989)). In reaching the conclusion that Doe's likelihood of success is high, this Court observes that Village does not contest the following facts:

(1) Village has publicly sponsored and promoted a festival to be held at Caesar Park, which is owned, operated and under the control of the Village, commencing on August 10, 1990 and running through August 12, 1990. As a part of that festival, the Village is sponsoring[4], and has publicly promoted, a Roman Catholic mass to be conducted on August 11, 1990 by a priest, and this sectarian religious service will include the prayers of the mass and readings from the Bible, will be celebrated on an altar, and will include a cross, lighted candles and the distribution of the Sacrament of Holy Communion. Indeed, the priest who will conduct this service was recruited, identified and invited by an employee of Village to conduct the mass.

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[4] Defendants' counsel has stated on August 11, 1990 that defendants do not concede the "sponsorship" of the mass. Even noting that demurrer, this Court determines that it is really not possible to reconcile that position with Village's own characterizations in its own publication, as set out in the next subparagraph of the text.

(2) The *Crestwood Adviser* ("*Adviser*") is an official government publication that is owned and published by Village. Prominently displayed on the *Adviser* masthead are the names of top Village officials. In the August 1990 issue of the *Adviser*, Village has promoted the Italian festival, and has prominently featured and promoted the Roman Catholic mass, in an explicit and unambiguous manner. Included in this official government publication is a headline somewhat resembling a newspaper headline reading "*Italian Mass* to be celebrated at *our* Italian Fest" (Exhibit A to Plaintiff's Complaint ("Ex. A") (emphasis added)). Moreover the first line in the article states that "[a]n authentic *Italian Mass* will be *celebrated* under the Beer Garden tent at *Crestwood's* second Italian Fest . . . ." (Ex. A (emphasis added)). In addition, this issue of the *Adviser* includes a promotional advertisement for the Italian Fest that describes many of the festival's features, and has a separate box inviting readers to "Join *Us* for a Traditional Italian Mass Celebration at 4 p.m., Sat., August 11th. No admittance charge for Mass." (Ex. A (emphasis added)). In no manner does the *Adviser* indicate that the mass, or indeed any part of the festival, is being sponsored, promoted or conducted by any entity other than Village itself.

Applying the *Lemon* test to these facts, it is readily apparent that Village's explicit and unambiguous sponsorship of a sectarian religious service as part of a Village-sponsored festival has an impermissible religious effect. More recently, the Supreme Court's decision in *County of Allegheny* further explained that the "effects" portion of the

Lemon test requires voiding the challenged government action if the action conveys a message of endorsement of a particular religious belief or practice. Here, not only has Village promoted the Italian fest as a Village-sponsored event, but it also has singled out the mass from the other festival activities and invited people to "Join Us" for that service in an indisputably official government publication, the *Crestwood Adviser*. This message conveyed in the *Adviser* closely identifies Village with the practices of a particular sect in the Christian religion, and clearly has an impermissible religious effect.

This Court finds it particularly significant in determining Doe's likelihood of success that no case cited by defendants (and none that this Court is aware of), discussing the amalgam of factors to be considered in evaluating whether a particular religious display or activity constitutes an Establishment Clause violation, involves government activities or events where, as here, the government has so clearly singled out the religious aspect of a government event or display and explicitly invited the public to attend and participate in that particular religious aspect.

d. *Balancing of harms favors the plaintiff.* This Court has already found that plaintiff will suffer immediate and irreparable harm if a Temporary Restraining Order is not issued. In assessing the potential harm to defendants, the Court finds that nothing has been presented that would show any harm to the defendants if a temporary restraining order is entered. Indeed, because there is no admission charge for the mass, there certainly can

be no argument that Village will suffer any adverse financial consequences if the temporary restraining order is granted. *Roland Machinery*, 749 F.2d at 387-88 teaches the balancing of harms to litigants (that is, comparing the harm sustained by plaintiffs if a preliminary injunction were wrongfully denied with the harm sustained by defendants if the preliminary injunction is wrongfully granted) interacts with the likelihood of success on the merits on a sliding scale basis: In capsule form, the more likely the plaintiff is to win, the less heavily the balance of harms needs to weigh in his favor. Here Doe has shown a very high probability of winning, and no hardship on defendants has been shown at all, so that *both* components of the sliding-scale analysis weigh heavily in Doe's favor. Based on the relative harms that may be suffered by the parties, this Court finds that the potential harm to the plaintiff if a Temporary Restraining Order is not entered substantially outweighs any potential harm to defendants that may be occasioned by the issuance of temporary relief.

e. *Issuance of a Temporary Restraining Order will not disserve the public interest. Roland Machinery* requires this Court to consider the consequences to third parties of an order granting or denying preliminary relief (749 F.2d at 388). Here the "public interest," as it is termed in the case law, cannot be disserved by issuance of a temporary restraining order—no legitimate interest of any third party has been or can be identified that would be infringed by such issuance. On the contrary, the granting of a temporary restraining order will affirmatively serve the public interest by

protecting the religious liberty of all citizens, whether or not of the Catholic faith.

3. Doe's Motion For A Temporary Restraining Order is therefore granted.

4. Defendants VILLAGE OF CRESTWOOD and CHESTER STRANCZEK, in his official capacity, and their officers, agents, servants, employees, attorneys, and persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, are hereby enjoined from conducting, or allowing to be conducted, a Roman Catholic mass as part of the Village-sponsored Italian Fest on Village property.

5. This Court, of course, is required by Rule 65(c) to consider the issue of security, in an amount deemed proper by this Court, to be provided by the applicant for injunctive relief, in this case plaintiff John Doe. Because defendants have not presented any indication of potential harm if they are wrongfully enjoined, and have not in any event requested such security, this Court deems a security bond to be unnecessary at this time.

6. This Temporary Restraining Order reflects the oral order of this Court entered at approximately 5 p.m. on August 10, 1990, at the hearing on the motion. Pursuant to the Rules, this Temporary Restraining Order shall remain in effect until 5 p.m. August 24, 1990.

ENTER:

_____

Milton I. Shadur
United States District Judge

DATED: August 11, 1990
nunc pro tunc
August 10, 1990 at 5 p.m.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOCKET NO. 90 C4655

JOHN DOE,

Plaintiff,

vs.

VILLAGE OF CRESTWOOD, ILLINOIS, et al.,

Defendants.

Chicago, Illinois
August 10, 1990
5:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge

APPEARANCES:

For the Plaintiff:

MS. JANE M. WHICHER,
MR. HARVEY GROSSMAN and
MR. ALAN K. CHEN

For the Defendants:

MR. THOMAS K. McQUEEN and
MR. STUART RAPPAPORT

JESSE ANDREWS
Official Court Reporter—U.S. District Court
219 S. Dearborn Street
Chicago, Illinois 60604
(312) 435-6899

* * * * * *

THE COURT: 90 C 4655, Doe vs. Village of Crestwood.

Counsel, do you want to reflect your appearances for the record, please?

MS. WHICHER: Good afternoon, your Honor. Jane Whicher, Harvey Grossman and Alan Chen for the plaintiff John Doe.

THE COURT: Just a minute.

MR. McQUEEN: Good afternoon, your Honor. Thomas McQueen and Stuart Rappaport on behalf of the defendants Village of Crestwood and Chester Stranczek its Mayor.

I would ask leave at this, your Honor, to file my appearance—our appearances—and our affidavits in compliance with Rule 39.

THE COURT: Surely.

MR. McQUEEN: We also have prepared, your Honor, and I ask leave to file the original and one copy of a memorandum in opposition, a copy of which has been served upon counsel for the plaintiffs. And I will acknowledge receipt of their Motion to Proceed Anonymously, their Motion for Temporary Restraining Order, Memorandum in Support, and Plaintiff's Motion for Leave to File Declaratory—Declaration—of John Doe as a Sup-

pressed Document Instanter, and we have accepted service on behalf of both party defendants, your Honor.

THE COURT: Thank you.

All right. Let me just take a look, if I may, at the memorandum in opposition before we get any farther.

(Pause)

Okay. I have read it. May I hear from plaintiff's counsel? Have you had a chance to read it?

MS. WHICHER: I have, your Honor. And I think—

THE COURT: By the way, I should say at the outset I want to express my thanks for your coming over here, and also my apologies for sort of having sent you from pillar to post. I had a trial that, as you heard if you got here early enough, was just in its final throes, and then I had another emergency that had previously been sent on that caused me to cancel a final pretrial conference that I had scheduled to go on another matter. And I had intended originally, as I have the right to do under our local court rules, to say that it should go to the emergency judge, and indeed I so indicated.

And then when Judge Bua, who happens to be emergency judge, said that he would not be in a position to deal with it—that he would disqualify himself from involving himself in it—at that point there really isn't a court rule that copes with that problem. And accordingly I then said, "Well, let's see if I can try to work it out so that I can discharge my own responsibilities, because the case has been assigned to me." So I appreciate your being here, and I'm sorry that you had to get bounced around.

But anyway, go ahead, Ms. Whicher.

MS. WHICHER: Thank you. And we certainly do appreciate the Court's accommodation in making itself available to hear this.

THE COURT: Don't use the word "accommodation." That's a word of some sensitivity.

MS. WHICHER: Your Honor, I have read the defendant's response to our motion for temporary restraining order, and I would like to point out to the court that the critical facts of this religious service that is planned for tomorrow afternoon are not disputed by the defendants. The defendant doesn't dispute—

THE COURT: Yes. And they don't purport to, right?

MR. McQUEEN: No, Judge.

MS. WHICHER: The defendants don't dispute that the Mass is a part of the Festival, that the Mass itself is sponsored by the Village. That the Village recruited a priest to conduct this religious service. That the Village is waiving the admission fee for those who wish to attend the religious service portion of the Festival. That it has invited the public to join it. Its own publicity invites the public to "Join Us in an Italian Mass."

The Village has publicized this Festival, publicized the Mass. It has aligned itself with the religious doctrine of the Catholic Church by doing that. It has made itself the sponsor of this religious expression in an unambiguous way. The performance—the Mass—is scheduled for tomorrow at 4:00 o'clock, and we seek a temporary restraining order barring this Mass from going forward tomorrow as planned at this site.

Your Honor, the case law is clear that the test that is applied in a situation like this is the familiar Lemon test,

which I know that this Court has had great deal of experience with. This clearly is the paradigm of the endorsement test that Justice O'Connor spoke about in her recent opinion ACLU vs. County of Allegheny. She said that the First Amendment is violated whenever the government appears to take a position on questions of religious belief. That is absolutely what the Village of Crestwood has done by sponsoring this Mass.

Clearly there is no secular purpose behind the Village sponsorship of a distinctively entirely religious rite. This is a sectarian service officiated at by a priest that was recruited by the Village itself. This has an undeniably religious effect. The Village has invited the public to join it in the celebration of the Catholic religious faith. This is a case where the Village has reserved a public park, public property for its exclusive use. It has sponsored a Festival and during that Festival it has organized, planned and encouraged its citizens to join it in celebrating the Catholic faith.

The defendants' response would have this Court focus not on the Mass but on a three day—the three evening Italian Festival as a whole. But your Honor, to do that really ignores what this Complaint is about. We are not complaining about the Festival itself. We are only complaining about this portion of the Festival. And the violation of the Establishment Clause is clear.

The Village's own publicity highlights this Mass as an important part of the Festival. The ad that the Village has put out in its own newspaper, the Crestwood Adviser, is attached to the Complaint as Exhibit A. The second page of Exhibit A, which has an ad for the Festival, prominently features the Mass when it says, "Join Us for a Traditional Italian Mass Celebration. No admittance charge for Mass."

In addition the article published by the Village in its own newspaper, which is the third page of Exhibit A, leads with the Italian Mass. The Village has highlighted this religious aspect.

THE COURT: Pardon me for asking. This is a publication that is a Village publication, I gather?

MS. WHICHER: It is, your Honor. The masthead is the first page of Exhibit A.

THE COURT: Yes, I see that.

MS. WHICHER: And this is—and the defendants don't deny this either—that this is a document that is published and circulated by the Village to residents of Crestwood. There is the Village's expression.

In sum, your Honor, this case represents a clear violation of the Establishment Clause. This Village has unequivocally and unambiguously endorsed Catholicism in arranging for this Mass, recruiting a priest to conduct it, setting aside this public park for the exclusive use of the Catholic Church to conduct this Mass. The violation of the Establishment Clause could not be more clear. Plaintiff seeks relief from this Court in the form today of a temporary restraining order to bar this Mass from going forward as planned tomorrow.

THE COURT: Mr. McQueen.

MR. McQUEEN: Judge, the Village of Crestwood begins this evening with a three-day Festival, two days of which are exclusively devoted to an Italian cultural event. And we concede that Caesar Park is indeed Village property. While we agree with most of the facts stated by the plaintiff, there are a couple that we don't entirely agree with them and let me address those.

First of all, this is not entirely a Village event in that there are two other participants who are assisting the Village in the course of the event.

THE COURT: But they are only—I think what they are addressing is really how it is characterized in Exhibit A, and in terms of whether that constitutes the kind of prohibited endorsement that is one portion of the standard to be applied judicially.

MR. McQUEEN: If I might, Judge, the Polish American community, their organization is assisting the Village in this. It is a private entity and will be running games and booths.

THE COURT: Who is the "our" that's referred to in Exhibit A? Exhibit A, as I see it, says "Crestwood Adviser."

MR. McQUEEN: The Festival itself.

THE COURT: Oh, no. Now wait a minute.

And at the top it says "Mayor, Chester Stranczek; Village Clerk, Nancy Benedetto; Trustees"—identifies them—and the address says "Village Hall."

MR. McQUEEN: Certainly, that is the Village publication, Judge. And this is the Village's Festival that the Village puts on with other persons.

THE COURT: And is the "Our" in the headline that says, "Italian Mass to be celebrated at our Italian Fest," is that something that there is somehow joint authorship on this publication? You know, that's really—

MR. McQUEEN: On the publication there is not joint authorship, Judge.

THE COURT: Okay.

MR. McQUEEN: That is published by the Village. I do not dispute that.

THE COURT: Okay.

MR. McQUEEN: The Mass is—well, let me continue. The Crestwood Women's Club—

THE COURT: Let me continue for a second.

MR. McQUEEN: All right.

THE COURT: When it says, "Join us for three evenings," I assume that the "us" in the Village publication means "us" the Village, right?

MR. McQUEEN: I think it means "us" the Village, members of the Village and anybody else that is here and wishes to attend this Festival.

THE COURT: When it says "Join us," that means anybody out there who wants to attend should "Join us"?

MR. McQUEEN: May do that.

THE COURT: Okay. Just a moment.

MR. McQUEEN: "We welcome you if you wish to come," I think is the essence of that.

THE COURT: Okay.

MR. McQUEEN: Judge, the Crestwood Women's Club, an organization formed back in 1931, holds the liquor license for this affair. It will be sponsoring games, and it has principal responsibility over the Mass. I do not deny that a member of the Village who happens also to be a member of the Crestwood Women's Club is the young lady who when her priest from her parish was unable to give the Italian Mass, during the course of conversations with the Italian Cultural Organization here in Chicago,

received a list of names of other priests in the Chicagoland area who spoke Italian. And it was a Village employee that spoke with that priest and obtained his services.

All of the materials used for the Mass are being donated by parishioners, not City donations. That will include a table, bunting about the table, glasses, dishes and so forth, all service related and those are all coming from members of the Women's Club none from the City or Village of Crestwood.

THE COURT: So you are saying no Village facilities other than the use of the park itself.

MR. McQUEEN: That's right. The chairs—

THE COURT: There is no expense, you're saying, other than the use of the park itself?

MR. McQUEEN: The Village is not funding that portion of the Italian Fest in the sense that the chairs that will be available for this, the tent in which it occurs, the stage upon which it will occur, the sound system, are all there, will be used this evening, will be used again tomorrow evening once the Fest is back under way after the Mass.

THE COURT: So you are saying there is no incremental cost?

MR. McQUEEN: That's right. Unlike the Philadelphia case by way of example. Now what the Supreme Court noted very carefully in its Lynch decision—and I think that is really the most important here—is you must not look at the individual point, you must look at the whole. And in that case we had a creche which was part of a whole—an entire scene depicting secular objects as well

as the Nativity scene. And we have got to do that in this case, Judge. We have to look at this program as a whole, and when that is done it is easily seen that this is primarily secular.

First of all, the whole focus of this program is the Italian culture. The program features Italian food. Features Italian wine. Music and entertainment by Italian entertainers. Comedy and an Italian ballet—again by Italian entertainers. Games including bocce ball, a traditional Italian game. Costumes of sorts will be used by the staff workers around the program identifying them as such in an Italian format. The colors of Italy prominently displayed throughout the park. And there will be a Cultural Center which includes historical and educational photographs, some of which come from the University of Chicago and the University of Illinois, of the growth of Italian American culture.

THE COURT: All well-known Italian organizations.

MR. McQUEEN: Pardon me?

THE COURT: Well-known Italian organizations?

MR. McQUEEN: Yes.

I think there can be no dispute of the role of the Catholic faith in the Italian culture. And indeed as part of this overall program there is a Mass which occurs before the Village begins charging fees, so there is not a matter of waiving the fees, the Mass occurs before the general program begins Saturday night. So this Mass—

THE COURT: Let me pause on that one for a second.

MR. McQUEEN: Yes?

THE COURT: Why then in this publicity does it refer to "No admittance charge for Mass"?

MR. McQUEEN: To make clear that if people are coming to the program they are not going to be charged the published program rate to go to the Mass. That rate begins after the Mass when the grounds are generally opened up before the main entertainment which occurs later in the evening. So Judge, this Mass—

THE COURT: That is the same thing that's said with respect to the Franz Benteler concert.

MR. McQUEEN: The Franz Benteler concert is entirely free, Judge. There is no charge to that Sunday event.

THE COURT: So they set that out also as being free?

MR. McQUEEN: Right. So this Mass, Judge, is but one incumbent part of a greater whole. And a whole which reflects independent historical and culture value. Now the Lemon test, with which your Honor is certainly familiar, focuses first upon a secular purpose.

THE COURT: Familiar enough to know that nobody understands it entirely.

MR. McQUEEN: Well, I am certainly not going to tell your Honor that I entirely understand it. And I have read your words about counsel attempting to have you make a bright line test and your frustration with doing that. And certainly I have seen over the last day and a half that a bright line test is difficult.

But in any event, Judge, it seems to me that the facts here, unlike so many of these cases where injunctive relief has been entered, that we are celebrating not a religious event but the Italian culture. There is not religious symbolism overall in this event. It is a public relations event for the Village of Crestwood, its citizens and citizens of the Italian culture and otherwise throughout the South Chicago region. We need not establish that there is an

exclusively secular purpose. The Constitution provides and the Supreme Court has said that the Constitution contemplates that on occasion there may be some advancement of religion resulting from government action. I suggest that this Mass neither advances nor inhibits religion in principal or primary effect.

The second—

THE COURT: Surely you can't say that. I mean you know it's one thing to say that the *totality* doesn't advance religion, but you are not seriously asserting—

MR. McQUEEN: I am no—

THE COURT: —that the Mass does not?

MR. McQUEEN: No, no. I am not saying that the Mass be by itself. I am saying that the Mass in the context of the entire program.

THE COURT: But that is not what you said. That's the reason that I posed it.

MR. McQUEEN: I misspoke then, judge, and I apologize to the Court. In the totality of this event, this event does not advance nor inhibit religion. There is not a purely religious message being sent by the Village from this program. The message being sent is one of Italian culture. "Join us to learn about the culture of our Italian brothers and sisters."

THE COURT: Can I ask you a question about that?

MR. McQUEEN: Yes, Judge.

THE COURT: Because my recollection—I certainly haven't surveyed all the cases again, although at one point I was compelled to do that, and not too long ago. But I have no recollection that in any of the cases that dealt

with the sort of what I might characterize as the sort of amalgam or nonseparability approach, there was anything in the way in which the thing was promoted that singled out the portion of the total presentation that was clearly religious in character. That is, I don't now recall anything in any of the cases that had, you know, the combination of the creche with other things in which the sponsors, the promoters ever said, "Come and see our creche" or anything else that sought to single it out rather than simply presenting it—that is, making it available to the viewer, with the viewer then having the opportunity to look at whatever part of the totality the viewer wanted.

As we know, the standing issue at least requires some showing that somebody is going to avert his or her eyes from it (that's what the cases talk about). But in terms of the person who was not minded that way, at least my recollection of the cases (maybe can you help me on this) is that there was never a self-characterization that focused upon what has to be viewed, if looked at itself, as a religious item—something that, if looked at itself, does not have the kind of overall portrayal that you have referred to. Am I wrong about that?

MR. McQUEEN: I cannot cite a case. I can't disagree with your Honor's recollection.

THE COURT: Ms. Whicher, do you know of anything that deals with that? Do you understand the question I am posing?

MS. WHICHER: I do believe I understand the question, your Honor, and I don't know of any case that discusses that, or where that—the religious aspect of a celebration that had different aspects to it was highlighted in the way that this is.

THE COURT: As you know, Mr. McQueen, these cases do pose a lot of difficulty, and in part because the approach that's been included in attempting to separate out case A from case B has always made an effort to engage in what I have just referred to, for lack of a better term, as a kind of amalgam notion. That is, if you look at the totality is there enough in it that says, "Oh, no. This really has an important or serious component that tends to advance religion, so much so that that's the thing that the Court will focus on and say is not permissible"—as contrasted with the situation in which it the thing does not occupy the kind of separate prominence or separability, or however you want to characterize it, so that the court says, "Looking at the thing as a whole, we don't think that the overall purpose is one that the First Amendment prohibits."

And my reason for asking the question that I did is that in an important sense the party that promotes or sponsors any kind of activity has the power to characterize it in a way that I think then the courts ought to pay attention to. And what I will tell you when I looked at this—you know, just in terms of its immediate impact, what struck me was that when the Village sends out a message about the Festival itself in the Village's publication, it's jas (sic) a two-page—I am sorry, a two-paragraph—article. And the two-paragraph article occupies, you know, five lines of type in the first paragraph, four lines plus a number in the second paragraph. The total space that's occupied by those is something that is about equal to the three lines of bold headline. And what we have in the Village's own characterization is that the headline says, "Italian Mass to be celebrated at our Italian Fest." And then the first paragraph of the publicity that the Village itself puts out highlights "An authentic Italian Mass," the

fact that it's going to be officiated (as it must be of course) by a priest and says that there is no admission charge. Then the second paragraph talking, about this totality event talks about the fact that top named entertainers are going to be featured at the Fest, celebrated August 10th and 11th, and the tickets are $5 each, and says "For more information, call this number."

Now that, I have to tell you, is not the hallmark of something in which you say, "Well this just a piece of the action"—you know, that this is just something that comes along for the ride. The self-characterization is something that I think tends to negate the way in which you are portraying it.

You know it would be one thing, I suppose, if what we had was the Mass equivalent of a creche, in which people you know come to the thing and if they want to participate in the Mass they are free to do that. And it is part of, as you've characterized it (and I think fairly), a total presentation that somehow is intended to replicate over here a lot of aspects of Italian life in Italy.

But what is troublesome about that sort of portrayal is that I don't think it is a fair characterization of how the Village itself has framed the function. And I mention that going back to the other part—you know, the ad part itself—that doesn't have the same degree of prominence that I've described in terms of giving it top billing if I can put it in those terms, but it does separate out the Mass as one of the items here. And again it says, "Join Us for a Traditional Italian Mass Celebration." Now the only fair way in which that can be read—and the headline when it says, "Join Us" in a publication that's an official publication—this is not like the Pioneer Press that puts out a Highland Park Tagenblatt or whatever, Glencoe

News-Voice or, you know, different publications. This is one that emanates from the Village. These are the officials speaking. They are the ones who are featured in the masthead.

So the idea of saying that "Join Us" means join the unnamed people out there who are co-founders or co-sponsors to this thing again is not, I fear, an accurate portrayal. That's the part that strikes—not only strikes the eye but strikes the mind—in, this is an effort to see where on the line of cases that's talked about here this case falls. And you know, if we look at the three-part Lemon test (which I guess everybody says—it's easy to say—it applies, it controls, because then that's only the start, I guess, rather than the end of the analysis), but when we talk about the Lemon test that you yourself set out in your memorandum, you're characterizing it as the—well, let me grab your memorandum instead of theirs I want yours. Here it is.

In terms of the practice having a secular purpose that of course in a sense begs the question because it talks about the practice, and the question is: What is the practice? In many situations what's looked at is the total picture. It's, you know, the Christmas tree over here and the creche over there and the Santa Claus sleigh over there—and what is it in totality, what is the practice that's being talked about? It seems to me that the one problem that is created by the defendants in this case is that the defendants themselves have characterized the practice in a meaningful way as being the separate portion of it which is the Mass.

When you talk about the "Principal or primary effect not advancing nor inhibiting religion," that really falls under the same mantle. That is, if the game is lost on the first one, it is at least equally well lost on the second.

And as to the third one—that is, "no excessive entanglement between the government and the religious organizations"—your point about no incremental cost, which I certainly credit, doesn't take into account, I think, the fact that you have a Village facility that is permitted to do this, at least for the portion that is intended to be occupied by the Mass.

MR. McQUEEN: Well, if that were the case, Judge, it seems to me that no public park could at any time be used for a purpose such as this.

THE COURT: Well, of course remember that all of the—you know one of the problems with this so-called three-part test is that they are so much interlinked—you know, one impacts on the other, and therefore you can't in that sense separate out. You are quite right. You see, if we didn't start with the problem that's created by the Village itself, I think this would certainly be at a minimum a much more difficult problem to resolve. But what sticks me at the outset is the self-portrayal. And I find it very difficult to understand how the Village, having chosen to advertise, if I might put it in those terms, and say "we are going to deliver as advertised," is in a position—having said that and then having the issue posed to it—to start to back away from that. This is how the matter is presented by the defendants.

Now if we focus on what the standards are for injunctive relief, as you know in terms of "reasonable likelihood of success" that's characterized consistently by our Court of Appeals as dealing with a quite low threshold, one that I must say I frequently don't agree with in those terms, because in a sense that's also begging the question to say "more than a negligible likelihood." Because if all you had was more than a negligible likelihood, the balancing of

harms (the other part of this sliding-scale thing) would have to be overpowering. That's one of the problems that I had with Judge Posner's noble effort to try to quantify the thing in that footnote, because you know literally applied, as I have said on some other occasions, if you had a $5,000 business with a 99.9 percent chance of prevailing it could never get a TRO against a billion dollar company. And of course all of us know that—you know, the law just can't be that way.

But what we are dealing with here, because my reason for starting with that factor (although I recognize that more popularly you look at some of the other things first) is twofold: First, that there are cases like O'Connor against Board of Education—and I guess a couple of others—that have said that if the plaintiff flunks out on that one the plaintiff has got to lose, and therefore you might just as well, I suppose, look at likelihood of success first. But the other one is that has really been the focus of my attempt at an analysis of the Supreme Court law on this. And my determination on that has to be that in terms of likelihood of success it is much more substantial than a reasonable likelihood of success, something that enters into the interplay of balancing of harms.

Backing up for a moment, when we deal with First Amendment rights—and this has been said, I guess, in the context of Elrod against Burns and as well, I think, where the First Amendment right that is involved is the twofold part having to do with religion—the irreparability of harm is pretty much self-defining. That is, if the event occurs then the matter is lost. And by the way, although Roland Machinery against Dresser Industries quite properly and carefully says that we ought to look at two things—one, irreparability of harm and two, inadequacy of any remedy at law—in a case in which the relief

that it sought is injunctive, and that's really the entire emphasis here, the inadequacy remedy at law is also self-demonstrated.

So with those factors present, what we come to is the balancing of harms. It's no longer, I know, and you know, fashionable to say as it once was that the First Amendment occupies a special place in the constitutional firmament. But it's awfully difficult to balance out the harms when we come to the intangible rights that are assured by First Amendment. By definition the First Amendment, like the other provisions of the Bill of Rights is antimajoritarian. What happens is that we often have cases in which the one person or the small group—you know, the atheist—finds entitlement to protection by the First Amendment, although I suppose that's somewhat parallel to the example that I gave to you about the businesses: How do you weigh the matter in terms of balancing of harms? If you were really to permit a numbers game to apply to that, then I suspect that good parts of the First Amendment, and indeed good parts of other portions of the Bill of Rights, would simply be lost. And therefore in terms of balancing of harms, which the cases tell us is intended to look at what would be the consequence of the improvident granting of injunctive relief where it shouldn't have been granted, as contrasted with the improvident denial of injunctive relief where it should have been granted, my sense is that given the nature of the interest sought to be preserved here (the First Amendment right) it has to be concluded that that balancing of harms of what I've characterized as the intangible First Amendment right has to be considered as having been satisfied as well. And if we weigh it in terms of likelihood of success—that sliding scale—I again find that there is really no serious contest in that regard.

As for the last item, which as you know is whether the granting of preliminary injunctive relief will disserve the public interest, Roland Machinery identifies that as the interest of nonparties. It is no longer, as I have said in I guess a couple of opinions, as it used to be sort of the caboose that goes along with the rest of the train, in which you've dealt with the first four and the fifth one follows automatically. In the First Amendment context I think it is interlinked with the thing that I have talked about. That is, my sense is that it would be a contradiction in terms to say that preliminary injunctive relief that preserves First Amendment values disserves the public interest. I honestly don't know how that could fairly be said.

And accordingly my sense is that the five factors that enter into the granting of preliminary injunctive relief are satisfied here. And I emphasize again that in major part because of the way in which the Village itself has chosen to present this. Not in a lawyer presentation. And don't misunderstand, I am not faulting you for that. You know, that's your job. But you see, until the lawyer gets into the act and starts to parse it out and says, "Wait a minute. You know, it doesn't satisfy this and doesn't satisfy that," when the Village was functioning in its governmental way—in its institutional way—the Village painted a very different picture from the one that able counsel seeks to present now. And that really is the important factor, as I perceive it, in parsing this one out and in dealing with which side of the line it falls on—whether in the end result of the conclusion in Lynch, the end result in the County of Allegheny case, and the host of other cases we deal with. So that my sense is that, as much as you may say that the Mass is an integral part of Italian culture (and it certainly is), I think it cannot fairly be said that

given our First Amendment, which is a burden that's not visited on the Italian government, it does not play the same role in ours.

MR. McQUEEN: Judge, if I may make one point from a standing standpoint.

THE COURT: Sure.

MR. McQUEEN: It seems to me that the pleading before your Honor does not establish the standing necessary to grant this relief and I will tell you why, Judge.

THE COURT: Yes.

MR. McQUEEN: Neither in your case Doe vs. Small nor the Saint Charles case was there merely an allegation that I am going to reroute myself or that I am not going to go to the park as there is in this case. Both those cases had two allegations: In the first instance, I use this facility or I use this route, and I will not now because of the activity of the governmental body. This pleading does not make that allegation. And I think for that reason lacks a sufficient standing to get on to the issue of whether or not there need be this extraordinary injunctive relief. I want to say that—

THE COURT: Of course I looked at that, and I suppose that what we have to look at is what's the fair inference that we deal with. If you look at paragraph 13 (and I've focused on that, too) what it says is, "The plaintiff will avoid use of Caesar Park while the Mass is being conducted there." Now I am not sure that that's a fair distinction of the kind that you have made in terms of Doe against Small—I think that was the case if I am not mistaken.

MR. McQUEEN: It was, Judge.

THE COURT: Yes. Let me look at something here.

MR. GROSSMAN: Your Honor, you have a copy of that affidavit as an exhibit redacted without opening that. If you wish to open it of course we have no objection.

THE COURT: Well, do you have—

MR. GROSSMAN: Under the motion to file that as suppressed document.

THE COURT: As part of the motion.

MR. CHEN: Actually, your Honor, it is attached to the motion to proceed anonymously as Exhibit A in a redacted version.

THE COURT: Wait a minute. Somehow that didn't get to me. That is the one document that I didn't get. I beg your pardon.

MR. GROSSMAN: Your Honor, might we speak briefly to this point so that it might alleviate the Court's inquiry.

THE COURT: Yes. Sure.

MR. GROSSMAN: We are the draftspersons of both the standing allegations in the City of St. Charles as well as the standing allegations in Doe vs. Small, both cases referred to by defendants' counsel. We intended these allegations to mean precisely what the Court has interpreted it to mean. To the extent that hypertechnical reading of this Complaint—and I might add that notice pleading is the proposition that we are before the Court on—is of any concern to the Court, we would be happy to file supplemental affidavits this evening if that's necessary to clarify that allegation. We sought by use of the words that he would avoid during this period of time that in fact his intentions are clearly to participate if this event

is not—if this Mass does not got forward. He would like to be free to visit those fair grounds.

THE COURT: You know, I must confess that I did not focus on an effort to parse it in the sense, Mr. McQueen, that you have urged. Because I thought that the inference that it gave when it talked about not doing it during the Mass carried with it with the obverse side of the coin, and it really represented an intention to avoid that function, which at least as I read in the cases has been enough to confirm standing. And if there is any potential ambiguity on that score (and I am not sure that there is) I guess Rule 15(a) says I couldn't stop you if wanted to file an amendment. That's the free bite rule. But at least I should make plain that my reading of the allegation is just as I've described. If the people who have accepted responsibility—Mr. Chen signed on—are saying that that was their intention, I think that is a fair reading. Then if the record needs to be any further clarified in that respect, you can go ahead and do that. But I will make plain (and I do) that my reading and my ruling are based upon the understanding that the intent of this allegation is that we have someone who would otherwise use the park but, as is asserted affirmatively, would avoid the use of the park while the Mass is being conducted.

Well, you know, I have dealt orally with what the findings are. And based on those findings it's my determination that it's appropriate to and I do issue a temporary restraining order that prohibits the defendants and their officers, agents, servants, employees and attorneys, and those in active concert and participation with them, from conducting or allowing to be conducted a Roman Catholic Mass on the Village property as part of this Village-sponsored event.

Now I guess the question I have to ask of you is whether there is a—if you want to tender a draft form of order, I have already stated—by the way that's entered at 5:35 on August 10th. As you know, TRO's are by definition matters of limited life, although in a sense this is really I guess the ultimate relief given the timing of the Festival. But it does not seem to me very frankly that taking that factor into account (and I did do that) gives rise to any reason for a different result here.

Again the question is if you want to prepare a draft order to memorialize that, I am going to be here in chambers working tomorrow morning from—well I'll be here earlier than anybody would care to be here—but I do expect to leave probably at about 11:00 o'clock, having put in a full day.

Now I don't know what your pleasure is in that regard.

MR. GROSSMAN: We would be happy to assume that drafting responsibility, your Honor.

THE COURT: What you probably ought to do is perhaps get—I see my clerks are both here—you might want to get—both sides might want to get—copies of perhaps a sample, unless you have one that has been entered in a case that I have dealt with previously. You may or may not have one. I don't know.

MR. GROSSMAN: We probably have copies of such an order, your Honor, but we would be happy to pick one up.

THE COURT: Anyway you want to check. Both sides ought to get a copy.

MR. GROSSMAN: Your Honor, if I might note simply for the record we do ask for additional injunctive relief because this isn't the whole ball of wax, so to speak, in

terms of the equitable remedy that we seek. In view of the pattern of the City in carrying out these Festivals, this is the second—

THE COURT: But wait. All that is being dealt with now—I mean all that's imminent now, and the reason for your coming in on an emergency basis, is this item.

MR. GROSSMAN: Yes.

THE COURT: I am not addressing—when I said that in a sense the TRO is ultimate relief given the timing, I think that's a fair statement with respect to this proposed thing. That doesn't mean that's the end of the case.

MR. GROSSMAN: Yes.

THE COURT: Okay.

MR. McQUEEN: Your Honor, I would at this time ask leave to file our motion for stay pending appeal. I have served a copy on the plaintiff, an original and one copy for the Court. By the plaintiff waiting until very much the 11th hour, he has all but chosen to deny our ability to seek any further hearing before this Court, seek any hearing in the United States Court of Appeals. So for that reason we ask the Court to stay its order pending our appeal.

MS. WHICHER: Your Honor, if I may—

THE COURT: Yes. Go ahead.

MS. WHICHER: Excuse me. I'd like to respond briefly to the time point. This matter was brought to our attention by Mr. Doe on Tuesday. I contacted the Village's attorney Wednesday morning. My call was returned by counsel on Wednesday afternoon. We met yesterday to discuss this matter and it was not until 9:30 last night that he indicated the Village's position, which was that

they would not—that they intended to go forward on Saturday. We had discussed yesterday the possibility of having this Mass moved to a church that might host it. And it wasn't until 9:30 last night that we were informed that the Village would not agree to that.

THE COURT: Look. I appreciate Ms. Whicher mentioning that. If that's accurate, you can hardly fault the plaintiff somehow for tardiness in addressing the issue here. As for the stay, just as I made the point that in a sense the granting of the preliminary relief is effectively also permanent relief with respect to conducting the Mass in the way that you have advertised (not in terms of conducting the Mass, I gather from what Ms. Whicher has said, as part of the Festival, but the way it has been advertised) the converse of that is that to grant a stay would effectively be to defeat, as I perceive from my analysis, the First Amendment right that is involved. Because a stay also means the end of it in those terms. The stay means you do it.

And accordingly I am not prepared to grant a stay. And it seems to me that perhaps, although I must say that you people apparently predicted what I was doing before I did it, because I didn't know what I was going to do—I hadn't even read the thing. But I'm not faulting you. Counsel always have to be careful and prepared.

I am not going to grant the stay, and that's particularly so given what has been asserted, I assume in good faith, by Ms. Whicher about the timing, and indeed the possibility—now I will use the term "accommodating," but in a different sense—of accommodating the concern or the desire to present something that so far as the Village is concerned is secular, and in which any matter that has the important religious content that's ascribed to a Mass is presented in what is, I guess, its normal environment,

which is not public property. So I think the idea of a stay is one that cannot seriously be entertained. And I deny the motion for a stay.

MR. McQUEEN: Judge, in that event we then move for certification for immediate appeal under Section 1292(b) of Title 28.

THE COURT: Why do you need a certification? You've got a TRO. What's the certification? I am not sure.

MR. GROSSMAN: Your Honor we probably—well, excuse me.

THE COURT: Well, you know maybe I have missed something here, and I must tell you I haven't taken a look at it, but I don't think you need a certification where what's involved is—let me look. You know as—let me see.

MR. McQUEEN: I believe, Judge, under the language you will find that the language—our motion tracks the statute and it—

THE COURT: But that says "an order not otherwise appealable," right?

MR. GROSSMAN: Your Honor, without regard to the underlying—the question of the appealability of this order as a TRO itself, we would oppose certification under 1292(b) simply because it does not conform.

THE COURT: Wait a minute. Let me try again. Look at 1292(a).

MR. GROSSMAN: Your Honor, we are embarrassingly without our statute book.

THE COURT: 1292(a)(1) says:

"Except as provided in subsections (c) and (d) of this section [(c) talks about the Court of Appeals for the Federal Circuit and (d) talks about the Court of In-

> ternational Trade], the court of appeals shall have jurisdiction of appeals from: (1) interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions."

And then (b) says:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion . . ."

Now it seems to me that maybe you haven't—maybe I've misread it, or maybe you haven't read it, but 1292(a)(1) gives an absolute right of appeal on injunctive relief.

MR. McQUEEN: In that event, Judge, I can withdraw that motion. For the record in that event I would ask leave to—

THE COURT: Take it back before you tender it, because you don't want to have a document in there that discloses that, or do you?

MR. McQUEEN: I will just take it back, your Honor. In that case, Judge, I will file with the Court our jurisdictional statement under Section 1292(a)(1) and ask that that be made—and I have served a copy on counsel—part of the record of these proceedings.

THE COURT: Sure.

MR. McQUEEN: And I also file our emergency notice of appeal with your clerk and I have tendered a copy of that to counsel for the plaintiff.

THE COURT: Do that. I must tell you I haven't focused on that point on the jurisdictional question—and that is, IF with an appeal having been taken I really retain enough to enter a written order.

MR. GROSSMAN: Your Honor, I think that would be ministerial. You have residual jurisdiction to carry out the authority.

THE COURT: Right. That's normally said in a different context. And what we have here is that the very thing that would be the subject of the written order is now the subject of an appeal. But I am not going to pause on that one. I don't know. Okay.

Thank you.

MS. WHICHER: Thank you.

MR. GROSSMAN: Thank you.

MR. McQUEEN: Thank you, your Honor.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

CERTIFICATE

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the report of proceedings in the above-entitled cause.

JESSE ANDREWS, CSR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
DATED: *August 10, 1990*

Crestwood Adviser

Mayor, Chester Stranczek; Village Clerk, Nancy Benedetto

Trustees: Ronald Wasag, John McNamara Fred Settanni, Lawrence Frawley, Jim Cluckey.

Village Hall 13840 Cicero 371-4800 August 1990 Volume 171

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No. 90-1573

In The
Supreme Court Of The United States
October Term, 1990

VILLAGE OF CRESTWOOD, ILLINOIS and CHESTER STRANCZEK, Mayor,

Petitioners,

v.

JOHN DOE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JOHN DOE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-1573

VILLAGE OF CRESTWOOD, ILLINOIS and CHESTER STRANCZEK, Mayor,

Petitioners,

v.

JOHN DOE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

**BRIEF IN OPPOSITION
OF RESPONDENT JOHN DOE**

Respondent John Doe submits this brief in opposition to the petition for a writ of certiorari in this case.1/

STATEMENT

Petitioners ask this Court to review the court of appeals' decision refusing to stay a temporary restraining order that enjoined petitioners from sponsoring a Roman Catholic mass as part of a festival in the Village park. The action has already been dismissed as moot at petitioners' behest. Moreover, one of the questions petitioners ask this Court to consider was neither presented to nor decided by the courts below. Under the

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1/ Respondent has used the fictitious name "John Doe" throughout this litigation. Pet. App. A-2.

circumstances, the petition for a writ of certiorari should be denied.2/

In 1989 and 1990, the Village of Crestwood, a suburban community southwest of Chicago, held Italian festivals in the Village park. As part of the 1989 festival, the Village sponsored a Roman Catholic mass, conducted by a priest in the park. It planned to sponsor such a mass again as part of its "Touch of Italy" festival on August 11, 1990. Pet. App. A-2 - A-5.

Respondent John Doe, a resident of Crestwood, filed suit on August 10, 1990, seeking both a temporary restraining order against the mass planned for the next evening and a permanent injunction

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2/ For reasons we discuss below, this is not a case in which it would be appropriate for the Court to issue an order vacating the court of appeals' opinion pursuant to United States v. Munsingwear, Inc., 340 U.S. 36 (1950). See infra, 13-15.

prohibiting petitioners from sponsoring masses in the future. The district court held a hearing that afternoon and issued a temporary restraining order. Pet. App. A-40 - A-48. The court found that the "Village's explicit and unambiguous sponsorship of a sectarian religious service as part of a Village-sponsored festival has an impermissible religious effect." Pet. App. A-45.

The Village then sought an emergency stay in the court of appeals. On August 11, 1990 the court denied the motion and stated that "[a]n explanation will follow in due course." Pet. App. A-1. But on September 19, 1990 -- well before the court of appeals' explanation arrived -- petitioners filed a motion in the district court to dismiss the complaint because the case had become moot. App., infra, 1a-4a. Petitioners pointed out that the mass had already

been conducted on private property and that "[t]he remaining activities of the Touch of Italy festival were not affected." Id. 2a. Respondent had also sought a permanent injunction against future masses; petitioners asserted that "[t]here is no new mass scheduled" and that "there is no plan to conduct the activity sought to be enjoined" in the future. Id. 3a. Accordingly, they argued, "[t]here is no longer any case or controversy for this Court to resolve." Ibid. Defendants also asserted that "[t]his case does not involve facts that are capable of repetition yet evading review." Ibid.

On October 15, 1990, at the request of the district court, petitioners filed a statement in support of their motion to dismiss signed by the Village Mayor, petitioner Chester Stranczek. App., infra, 17a-18a. The Mayor indicated that

"[t]he Village does not now contemplate that it will sponsor an Italian cultural festival in 1991" and that it "will not serve as the sponsor for a Catholic mass during the course of any Village-sponsored event occurring on public property." Id. 18a.

On October 26, 1990, while the motion to dismiss was pending in the district court, the court of appeals issued an opinion confirming its earlier action and affirming the district court's injunction. The majority of the panel, in an opinion by Judge Easterbrook, found that "the district court judge's conclusions cannot be found to be clearly erroneous." Pet. App. A-7.3/ The critical issue was whether the Village was sponsoring the mass; on the "slim

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3/ Judge Coffey dissented. Pet. App. A-7 - A-36.

record" available at the time, the district judge was entitled to conclude that it was. Ibid. The court of appeals noted that further proceedings were anticipated. "Doe wants an injunction against religious services at future festivals in Crestwood. We assume that the district judge will take evidence and make more detailed findings concerning the sponsorship of the mass and what, if anything, the Village has done (or could do) to demonstrate that it is providing a public forum but not endorsement." Ibid.

The further proceedings the court of appeals anticipated never took place, however, because petitioners persisted in their motion to have the district court dismiss the complaint as moot. The district court held a hearing on the motion on November 21, 1990. App., infra, 19a-32a. Respondent argued that the case was not moot because he was

seeking a permanent injunction against future masses. Id. 28a. But counsel for petitioners repeatedly assured the court that the Village had no plans to sponsor masses in the future:

> THE COURT: * * * My question, I guess, remains the same. That is, if there is an unequivocal statement by the Village that the mass in the form that was proposed at the time that the case came before me is not going to be repeated -- and at least that's what I understand your message to be, is it not?
>
> MR. McQUEEN [counsel for petitioners]: It is, Judge.
>
> * * *
>
> THE COURT: * * * [A]s I understand it, [the Village has made] an affirmative and firm undertaking that the factual setting that was before this Court in August when the case came up is not one that is going to be repeated.
>
> MR. McQUEEN: I think that is exactly, your Honor, what we presented in writing under the signature of one of the [petitioners], the Mayor, on behalf of the Village in the document we filed a month ago.

Id. 22a, 30a. In light of petitioners' assurances not only that they had complied with the court's temporary restraining order as to the mass scheduled for August 11th, but that they also had no intention of sponsoring masses in the future, the district court dismissed the complaint. App. infra, 31a.4/

REASONS FOR DENYING THE PETITION

The decision of the court of appeals, based on a scanty and undeveloped record, hinged on the factual determination that petitioners were about to sponsor a Roman Catholic mass as part of a municipal festival. Even if this

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4/ Respondent, who had opposed petitioners' motion to dismiss, initially filed a notice of appeal from the district court's mootness decision, but later voluntarily dismissed the appeal.

case had not already been dismissed as moot at petitioners' request and was based on a more substantial record, and even if both of the questions petitioners purport to present were raised and considered below, review of the court of appeals' fact-bound decision would be unwarranted. But in light of the fact that one of the questions presented -- the one that is also before this Court in Lee v. Weisman, No. 90-1014 -- was not presented to or decided by the courts below, and also in light of the fact that petitioners have already secured the dismissal of this action as moot, there can be no doubt that the petition should be denied.

I. There Is No Live Case Or Controversy Warranting Supreme Court Review

It hardly bears repeating that an actual, live controversy must exist at all stages of review and that this Court

cannot consider legal issues that are framed within moot cases. Lewis v. Continental Bank Corp., 110 S. Ct. 1249, 1253 (1990); Deakins v. Monaghan, 484 U.S. 193, 199 (1988); Preiser v. Newkirk, 422 U.S. 395, 401 (1975). "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them' and confines them to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" Lewis v. Continental Bank Corp., 110 S. Ct. at 1253 (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971)). As this Court explained in Lewis, the "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial

and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when the suit was filed, or when review was obtained in the Court of Appeals." Ibid.

In this case, the complaint has already been dismissed as moot by the district court on petitioners' own motion. Having succeeded in their effort to have the case dismissed, petitioners cannot now argue that there is a live case or controversy.

The district court accepted petitioners' assurances and dismissed the complaint as moot. That decision was not appealed and now stands as the law of the case. Under the circumstances -- and with the complaint already dismissed -- there is nothing more that this Court can do but to deny the petition.

II. The Court Should Not Issue A Munsingwear Order

This is not a case in which it would be appropriate to follow the procedure set out in United States v. Munsingwear, Inc., 340 U.S. 36 (1950), of vacating the court of appeals' judgment and instructing the district court to dismiss the complaint. First of all, the complaint has already been dismissed. Moreover, entry of a Munsingwear order is appropriate when "review * * * was prevented through happenstance." 340 U.S. at 40. When "review was prevented, not by 'happenstance,' but by the deliberate actions of the losing party before the district court," it is not appropriate to vacate the lower court opinions. Center for Science in the Public Interest v. Regan, 727 F.2d 1161, 1165 (D.C. Cir. 1984) ("CPSI").

It is one thing to vacate lower court decisions when the possibility of appellate review has been foreclosed by circumstances beyond the appealing party's control. But, as several courts of appeals have pointed out, it is quite another thing -- and an invitation to mischief -- to allow a losing party to avoid any future effect or precedential value an adverse decision may have by deciding to moot the action while an appeal or a petition for certiorari is pending. See, e.g., Riverhead Savings Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990); Blackwelder v. Safnauer, 866 F.2d 548, 551 (2d Cir. 1989); United States v. Garde, 848 F.2d 1307, 1311 (D.C. Cir. 1988); Northshore Development, Inc. v. Lee, 835 F.2d 580, 583 (5th Cir. 1988); CPSI, 727 F.2d at 1165-1166. Cf. Karcher v. May, 484 U.S. 72, 83 (1987) (this

Court will not vacate a lower court decision when the "controversy did not become moot due to circumstances unattributable to any of the parties").

In this case, petitioners decided that they would not continue their past practice of sponsoring masses in the Village park and thus mooted the complaint, particularly insofar as it sought a permanent injunction against future masses. In that circumstance, the parties should be left in the same position as if no appeal or petition had been filed, and the lower court decisions should be allowed to stand.

III. Review Of The Court Of Appeals' Decision Would Not Be Warranted Even If The Case Had Not Been Dismissed As Moot

Even if this case had not already been dismissed as moot, review by this Court would not be warranted. Try as they might, petitioners have failed to

cite a single case in which this Court or a court of appeals upheld municipal sponsorship of a full-blown religious service. There is no conflict among the circuits on this issue. In any event, this would not be an appropriate case for deciding that far-reaching Establishment Clause issue. As the court of appeals noted (Pet. App. A-7), its decision was based on a "slim record" as to the sponsorship and the precise nature of the planned religious observance. In fact, all that is formally in the record are the facts alleged in the verified complaint. Clearly any examination of such an important First Amendment issue would require a much better-developed record.

There is also no need to hold the petition in this case pending this Court's disposition of Lee v. Weisman, No. 90-1014 (cert. granted March 18,

1991). First of all, because this case has already been dismissed as moot, the outcome of Lee could not possibly affect the parties to this action. Even if the Court were to announce a new Establishment Clause test in Lee, there is no longer any case or controversy involving petitioners and respondent to which that test could possibly be applied.

Moreover, this case does not present the question at issue in Lee: whether direct or indirect government coercion is a necessary element of an Establishment Clause violation. Although petitioners include that issue as their second question presented, they did not make the coercion argument to either the district court or the court of appeals and neither of those courts considered or decided that issue. This Court does not ordinarily consider arguments not raised

or decided in the lower courts. Davis v. United States, 110 S. Ct. 2014, 2024 (1990); Delta Air Lines, Inc. v. August, 450 U.S. 346, 362 (1981). This moot case certainly does not warrant an exception to that rule.

Finally, although respondent believes that the First Circuit correctly decided Lee v. Weisman, even if this Court were to disagree and to hold that the benediction delivered at the public school graduation in that case does not violate the Establishment Clause, that would hardly mean that a municipality would be free to sponsor an entire religious service. If this Court were interested in deciding that much broader issue -- which would go to the heart of the Establishment Clause -- it should wait for a live controversy and a fully-developed record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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May 1991

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOE,	)	
	)	
Plaintiff,	)	
	)	No. 90 C 4655
v.	)	
	)	Judge
	)	Milton I. Shadur
VILLAGE OF CRESTWOOD, ILLINOIS and CHESTER STRANCZEK, Mayor of the Village of Crestwood, in his official capacity,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS

Defendants, Village of Crestwood, Illinois ("the Village") and Chester Stranczek, by their attorneys Jenner & Block and pursuant to Federal Rule of Civil Procedure 12(b)(6), hereby moves this Court to dismiss the plaintiff's complaint seeking injunctive and declaratory relief on the ground that plaintiff fails to state a claim for

which relief can be granted, because there is no case or controversy and because this case is now moot. In support of this motion, defendants state that:

1. Plaintiff filed this complaint on Friday, August 10, 1990, seeking to prevent a Roman Catholic mass from being conducted on Village property on Saturday, August 11, 1990, in conjunction with a Village-sponsored "Touch of Italy" festival. Late Friday afternoon, August 10, 1990, this Court issued a temporary restraining order forbidding the mass to go forward on Village property. An appeal was filed, but the Seventh Circuit refused to stay this Court's order. The Village abided by this order, and the mass proceeded on privately owned property. The remaining activities of the Touch of Italy festival were not affected.

2. There is no longer any case or controversy for this Court to resolve. The complained-of activity has already been enjoined; the mass was held on private property weeks ago. There is no new mass scheduled.

3. This case does not involve facts that are capable of repetition yet evading review. Plaintiff's success in obtaining a temporary restraining order enjoining the mass on public property demonstrates that fact. Consequently, this case is now completely moot.

4. A permanent injunction is an extraordinary remedy and should not be granted where, as here, there is no plan to conduct the activity sought to be enjoined.

5. In further support of this motion, defendants submit the accompanying memorandum of law.

WHEREFORE, defendants Village of Crestwood, Illinois and Chester Stranczek respectfully request this Court to dismiss this action.

Respectfully submitted,

VILLAGE OF CRESTWOOD, ILLINOIS and CHESTER STRANCZEK

By: _____
One Of Their Attorneys

Thomas K. McQueen
Barry Levenstam
Stuart N. Rappaport
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(312) 222-9350

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOE, Plaintiff,	)	
v.	)	No. 90 C 4655
VILLAGE OF CRESTWOOD, ILLINOIS and CHESTER STRANCZEK, Mayor of the Village of Crestwood, in his official capacity, Defendants.	)	Judge Milton I. Shadur

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Defendants Village of Crestwood, Illinois ("the Village") and Chester Stranczek, by their attorneys Jenner & Block, submit this memorandum of law in support of their motion to dismiss this action for failure to state a claim upon which relief can be granted. Because plaintiff has already successfully prevented the single act he sought to

enjoin and has not alleged that it will occur again, there is no case or controversy for this Court to resolve. Accordingly, this case must be dismissed.

INTRODUCTION

On August 10, 11, and 12, 1990, the Village hosted a three day "Touch of Italy" festival, which featured Italian food, drink, music, and entertainment. The festival also included a traditional Roman Catholic mass conducted in Italian, which took place on Saturday, August 11, 1990. As originally planned and advertised, the mass was to take place, with the other festival activities, in Caesar Park which is owned and operated by the Village. After seeing advertisements for the festival, including the mass, plaintiff filed this complaint on Friday, August 10, 1990, alleging that the celebration of the mass

on Village property would be unconstitutional. Plaintiff sought a temporary restraining order enjoining the mass, scheduled for the next day, from proceeding on public property. This Court issued the requested temporary restraining order. After unsuccessfully seeking stays of this order before this Court and the Seventh Circuit, the Village abided by this order, and the mass was conducted on private property on Saturday afternoon, August 11, 1990.

Plaintiff's complaint challenging the August 11 mass and seeking permanent injunctive and declaratory relief is still pending. This complaint, however, sets forth no claim upon which relief can now be granted, because the mass on Village property was blocked. Plaintiff does not allege any impending threat that defendants will attempt to celebrate a mass on public property. Thus, the

complaint presents no case or controversy for this Court to adjudicate, and the matter is now moot. Therefore, this case must be dismissed.

I. THIS ACTION PRESENTS NO CASE OR CONTROVERSY

To invoke the jurisdiction of a federal court, the plaintiff must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy. Flast v. Cohen, 392 U.S. 83 (1968). It is well settled law that in requesting prospective relief a plaintiff must demonstrate that "he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury must be both real and immediate, not 'conjectural' or 'hypothetical.'" City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). Past violations do not,

in themselves, present real and immediate threat of injury necessary to make out a "case or controversy." O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974).

When, as here, the sole act sought to be enjoined has been enjoined, there is no immediate and real danger of sustaining a direct injury and thus no case or controversy to resolve. This principle is illustrated by Committee for a Sane Nuclear Policy v. Indianapolis, 668 F. Supp. 1211 (S.D. Ind. 1987). The plaintiffs obtained an injunction prohibiting the City of Indianapolis from interfering with the "Shadow Project," a demonstration that involved painting human silhouettes on city sidewalks to commemorate the victims of the Hiroshima bombing on the anniversary of the incident. After the Shadow Project was carried out, the plaintiffs sought to enjoin the city from arresting them or

harassing them in preparing for or conducting the next year's Shadow Project. The court held that the plaintiffs' perceived threat of arrest and civil liability was too uncertain and speculative to create a justiciable case or controversy. Rather, the court held, given the posture of the action, any opinion rendered would be advisory. 668 F. Supp. at 1216.

This case is no different. Plaintiff's fears that the Village next year will attempt to hold a mass on public property are simply too uncertain and speculative to create a justiciable case or controversy. Indeed, the complaint plaintiff has lodged with this Court does not even allege that a mass is scheduled for next year -- his challenge is directed solely at the August 11, 1990 mass. Give that the act that he challenges has already occurred, free of

the supposed constitutional defect of which he complained, plaintiff cannot show that he is in danger of sustaining a "real and immediate" injury. Lyons, 461 U.S. at 102. Accordingly, plaintiff's complaint presents no live case or controversy.

II. THE COMPLETION OF THE MASS RENDERS THIS CASE MOOT

The doctrine of mootness seeks to preserve the historic conception of the federal courts as agencies for the resolution of disputes on which something tangible turns, as opposed to merely providing authoritative legal advice. Moore v. Thieret, 862 F.2d 148, 150 (7th Cir. 1988). Thus, when the likelihood of the challenged activity recurring is slight, the case is moot. Id. In United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569 (7th Cir. 1987), the Court applied this principle

where the government sought to appeal an order allowing a drug company to re-export certain animal drugs that it had imported in alleged violation of the FDA Act. The order had not been stayed, and the company went ahead and re-exported the drugs before the appeal could be heard. The Court refused to examine the merits of the case because there was no evidence, and very little probability, that the company planned to import any more drugs into the United States. Thus, the Court held, the case had become moot.

This case is likewise moot. While the Village has promoted Italian festivals, mass included, in 1989 and 1990, there is no current plan for another festival, much less one including a mass on public property.

Moreover, this is not a case where mootness is avoided because the conduct is capable of repetition yet evading

review. Before a court will find that a claim is not moot on the ground that it is capable of repetition yet evading review, two conditions must be met: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) and there is a reasonable expectation that the same complaining party will be subjected to the same action again. James Luterbach Construction Co. v. Adamkus, 781 F.2d 599, 602 (7th Cir. 1986) (plaintiff's challenge to the denial of a construction contract award where facility was already constructed was moot and not capable of repetition yet evading review).

Here, the plaintiff became aware of the mass in advance because of the advertisements. It is inconceivable that the Village would hold another public festival without advertising to inform

the public. But its very nature, then, if this situation ever were to recur, plaintiff would have plenty of advance notice. Thus, plaintiff's success in enjoining the mass this year shows that it was, and would be (if ever necessary), able to obtain review. Therefore, this case is now moot.

III. PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF

Permanent injunctive relief is an extraordinary remedy which should be granted sparingly and only for compelling reasons. Newhouse v. Probert, 608 F. Supp. 978, 984 (W.D. Mich. 1985). See Pfeifer v. Valukas, 117 F.R.D. 420, 424 (N.D. Ill. 1987) (permanent injunction is a drastic remedy). Such relief is not available to prevent hypothetical injuries feared as liable to occur at some indefinite time in the future, rather, the injury complained of must be

of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm. Newhouse, 608 F. Supp. at 978. Injunctive relief is not appropriate to prevent the possible occurrence of an event at some indefinite future time. Janowski v. International Brotherhood at Teamsters Local No. 710 Pension Fund, 673 F.2d 931, 941 (7th Cir. 1982), vacated on other grounds, 463 U.S. 1222 (1983).

Plaintiff has alleged no compelling reason for the extraordinary remedy of permanent injunctive relief. There is no imminent act to enjoin, and no clear and present need for equitable relief to prevent irreparable harm where no harm is alleged. This case does not even present a possible occurrence of an event at some indefinite future time, because plaintiff has not alleged that a mass may be scheduled on Village property in the

future. This Court should not issue an injunction in the absence of anything to enjoin.

CONCLUSION

Plaintiff alleges no claim upon which relief can be granted. Plaintiff's complaint challenges an action that was blocked several weeks ago; he does not allege that it will occur again. Thus, this action presents no case or controversy for this Court to adjudicate; the matter is moot, and injunctive relief is not available. Accordingly, this Court should dismiss this case.

Respectfully submitted,

VILLAGE OF CRESTWOOD, ILLINOIS
and CHESTER STRANCZEK

By: _____
One Of Their Attorneys

Thomas K. McQueen
Barry Levenstam
Stuart N. Rappaport
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOE,	)	
	)	
Plaintiff,	)	
	)	No. 90 C 4655
v.	)	
	)	Judge
	)	Milton I. Shadur
	)	
VILLAGE OF CRESTWOOD, ILLINOIS and CHESTER STRANCZEK, Mayor of the Village of Crestwood, in his official capacity,	)	
	)	
Defendants.	)	

DEFENDANTS' STATEMENT IN SUPPORT OF THEIR MOTION TO DISMISS

NOW COME the VILLAGE OF CRESTWOOD by and through its Mayor CHESTER STRANCZEK, defendants herein, and in support of their motion to dismiss these proceedings, present the Court with the following statements:

1. The Village of Crestwood has promoted and sponsored two Italian

cultural festivals on Village property, one in 1989 and one in 1990. The Village does not now contemplate that it will sponsor an Italian cultural festival in 1991.

2. The Village will not serve as the sponsor for a Catholic mass during the course of any Village-sponsored event occurring on public property.

3. The Village has not previously sponsored and does not contemplate sponsoring the annual Polish cultural festival held in the Village of Crestwood on Village property.

Respectfully submitted,

THE VILLAGE OF CRESTWOOD

By: _____
Chester Stranczek
Its Mayor

Thomas K. McQueen
Barry Levenstam
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611

October 15, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOE,	)	
	)	
Plaintiff,	)	
	)	No. 90 C 4655
v.	)	
	)	Chicago, Illinois
	)	November 21, 1990
VILLAGE OF CRESTWOOD,	)	9:15 o'clock a.m.
ILLINOIS, et al.	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
MILTON I. SHADUR, Judge

APPEARANCES:

For the Plaintiff: MS. JANE WHICHER

For the Defendants: MR. THOMAS McQUEEN &
MR. BARRY LEVENSTAM

JESSE ANDREWS
Official Court Reporter
U. S. District Court
219 S. Dearborn Street
Chicago, Illinois 60604
(312) 435-6899

* * * * * *

THE CLERK: Case No. 90 C 4655, John Doe vs. Village of Crestwood, status.

MS. WHICHER: Good morning, your Honor. Jane Whicher for the plaintiff John Doe.

MR. McQUEEN: Good morning, your Honor. Thomas McQueen and Barry Levenstam on behalf of the defendants.

MS. WHICHER: Your Honor, I discovered last night that the copy of our responsive brief which was filed in your chambers was missing an exhibit which is referred to in footnote 3 on page 5, and I brought some copies of that exhibit with me this morning. I've already provided a copy to Mr. McQueen. And if I could have leave to submit those to your clerk?

THE COURT: Sure.

MS. WHICHER: Thank you.

THE COURT: George, do you want to hand that to me? (Document tendered.)

MS. WHICHER: Your Honor, that's the newspaper article that's referred to concerning a referendum on the Village ballot that refers to a 1991 Italian Festival.

THE COURT: Yes. Counsel, anything?

MR. McQUEEN: There was a referendum, your Honor, put I believe the week after your Honor entered the order in this case. The Village filed with the Clerk of the Court appropriate documentation for a referendum. There was a referendum on the ballot in November, and the voters spoke on the issue.

This article is from the middle of August -- well, later August -- August 25th -- according to the typewritten part there. But the Village has presented to your Honor its position with respect to the issue sometime

substantially subsequent to the time that this --

THE COURT: Yes. You've both gotten my letter, I trust?

MR. McQUEEN: Yes, Judge.

MS. WHICHER: Yes, your Honor.

THE COURT: And I saw what was covered in the memorandum from plaintiff's counsel. My question, I guess, remains the same. That is, if there is an unequivocal statement by the Village that the mass in the form that was proposed at the time that the case came before me is not going to be repeated -- and at least that's what I understand your message to be, is it not?

MR. McQUEEN: It is, Judge.

THE COURT: All right.

If that's true, then, although I understand the point that is made on behalf of the plaintiff, it seems to me that anything that is asked in terms of

permanent injunctive relief by definition has to deal with one of two alternatives. One is that the Court would be enjoining something that is not contemplated to be done, which I think is inappropriate for a District Court to do when dealing with public officials. And the other is that the Court is being asked either to render an advisory opinion -- that is, to deal with facts not before it in terms of how things would or would not be impacted by First Amendment considerations -- or is being asked to somehow act in a standby capacity because of other concerns that are voiced by the plaintiff in the memorandum.

Now the sort of astonishing characterization in the dissenting opinion about "valet service," which was I thought extraordinarily offensive, misses the fact that this Court, like

every court in this building -- that is, every court below the 26th floor -- stands ready on an emergency basis to deal with TRO's and preliminary injunctions of all kinds always. Nothing to do with whether they are First Amendment considerations or any other. When facts are presented to the court, which are fresh facts, the court looks at them, deals with them and rules on concrete controversies, not on hypothetical ones.

And what I find troublesome in the suggestion that the Court ought to somehow retain jurisdiction, given the nature of the representations that I have now had reinforced by the Village, is that I am asked by the plaintiff to indulge something other than Article III jurisprudence.

Having said that, I will say (as my letter indicated) that in a very

important sense it frankly strikes me, given what I have heard in the way of representation, that the defendant is doing exactly the same thing upstairs in the Court of Appeals -- that is, by what is being asked for. Now that's of course for them to decide. But it strikes me that where the conduct that was the subject of the injunction is gone -- it went without having been carried out -- that at this point what's being sought by the defendants is also an advisory opinion.

But that's their business, you know. Mine is mine. And I don't see anything, Ms. Whicher, in what's being presented that supports the notion that this Court has before it a live issue in permanent injunctive terms.

MS. WHICHER: Your Honor, if I might make two brief points in response. First of all, with regard to your Honor's

comment and Mr. McQueen's representation that the situation in the form that it was presented to you would not be repeated, I think there is a great deal of dispute, and the appellate briefs highlight that about exactly what that form is: Who was the real sponsor of the mass?

THE COURT: That is not the point.

MS. WHICHER: Whether it was the Women's Club or not.

THE COURT: Just a minute. Wait, wait, wait. That has to do with the issue of the legal effect of the factual situation that was presented to the Court. The question that I posed to Mr. McQueen was about repetition of the factual aspect. Mr. McQueen, is that how you understood my question?

MR. McQUEEN: That's how I understood it, and that's the

representation that I have made to the Court.

THE COURT: Okay.

Now you see, Ms. Whicher, if you say, "Well, suppose. Suppose that what the Village may decide to do is to conduct an Italian Fest and that, in conjunction with that, something is going to be done on property that is not Village property, and there is going to be a scenario." Well, you know, what am I supposed to do? Guess on that? I think it's inappropriate. There have been no formulated plans that I understand.

If and when the determination is made that they are going to be doing something other than what was put before the Court, and that I acted on and the Court of Appeals acted on, then it will be time enough, because that will be a ripe controversy. And I expect that some

other valet -- whatever one you're delivered to by the random assignment system -- will provide the parties with service at that point.

MS. WHICHER: Your Honor, my other point is simply this. That I guess given the representation in the Court of Appeals, I honestly am unclear about what it is the Village is representing will not occur again. And perhaps the appropriate course is for Mr. McQueen and Mr. Levenstam and I to sit down and see if we can't work out some agreed language to submit to the Court that would satisfy the plaintiff that the conduct that he complains of is not going to be repeated.

I proposed this once before in the form of a possible settlement to Mr. McQueen, and maybe that's the appropriate course so that the plaintiff can be assured that this situation is not going to happen again.

THE COURT: You see, your problem is that you use "this situation," and that's the definitional difficulty. Courts deal with concrete factual circumstances. One of the reasons that the existing cases may be viewed by some casual onlookers as roaming all over the lot is that each one of them is the product of a particular set of facts that has gotten presented to the courts at different levels. So that observers may say, and professors may write, and Law Review articles may be written, saying "Here is how the line is to be picked out," the phrase that Justice Frankfurter used when he was talking about how the law developed. And the problem is that this area of the law is not unique, you know. That's what produced McPherson against Buick Motor Company. They were dealing with a different set of facts, and the court said "This is different from what we had

before, and here is how the law is going to be framed. Motor cars are not carriages, you know."

And as a result I don't how to say any differently that what we have here is, as I understand it, an affirmative and firm undertaking that the factual setting that was before this Court in August when the case came up is not one that is going to be repeated.

MR. McQUEEN: I think that is exactly, your Honor, what we presented in writing under the signature of one of the party defendants, the Mayor, on behalf of the Village in the document we filed a month ago.

THE COURT: And I will take that at face value. It has been supported by counsel's representation. Indeed, I did note that in your latest petition to the Court of Appeals there was a sentence to the same effect toward the very end of it

-- which as I say struck me as somewhat inconsistent with what you were asking, but that's for others to decide. And therefore to me the case in terms of any permanent injunctive relief is rendered moot. And accordingly I am going to dismiss the action as moot. Thank you.

MR. McQUEEN: Thank you, Judge.

MS. WHICHER: Thank you, your Honor.

Your Honor, will you be issuing a minute order on this ruling?

THE COURT: The minute order is one sentence long: just the last sentence that I just gave you.

MS. WHICHER: Thank you, your Honor.

MR. McQUEEN: Thank you, Judge.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

C E R T I F I C A T E

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the report of proceedings in the above-entitled cause.

JESSE ANDREWS, CSR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
DATED: January 3, 1990

Supreme Court, U.S.
FILED
MAY 15 1991
OFFICE OF THE CLERK

No. 90-1573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

VILLAGE OF CRESTWOOD, ILLINOIS, and CHESTER STRANCZEK, Mayor of Crestwood, Illinois, in his official capacity,

Petitioners,

v.

JOHN DOE,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners, the Village of Crestwood, Illinois, and Mayor Chester Stranczek, in his official capacity, submit this reply in support of their petition for a writ of certiorari in this case.

In his brief in opposition, respondent John Doe devotes scant attention to the merits of the underlying dispute. Rather, he argues that procedural obstacles prevent review of this case. Specifically, respondent argues that the case is moot and that it is inappropriate for the Court to consider this case because the record is not fully developed. Both of these arguments result from respondent's

decision not to file suit until the afternoon before the mass. Neither of these arguments precludes consideration of the merits of this case.

I.

THIS CASE IS NOT MOOT.

This case is not moot because it falls squarely within the "capable of repetition, yet evading review" exception to the actual case-and-controversy requirement. *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). A situation is "capable of repetition, yet evading review" where "(1) the challenged transaction was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). This case satisfies both of these requirements.

A. This case satisfies the first prong of the *Southern Pacific/Weinstein* test: the "challenged transaction," *i.e.*, the injunction of the festival's mass, "was in its duration too short to be fully litigated prior to its cessation or expiration." *Id.* Despite substantial advance publicity, respondent did not file suit to enjoin the Italian mass until the afternoon of the day before the mass was scheduled to take place. After hearing brief oral argument, the district court issued the temporary restraining order at 6:00 p.m. the same day. About an hour later, petitioners filed a short emergency motion with the Court of Appeals seeking a stay of the district court's order. This motion was denied early the following afternoon, and the mass was not held in the park as planned.

This Court has held that orders having a longer life than the order at issue here satisfy the "evading review" element of the *Southern Pacific* exception. *See, e.g., Burlington N.R. Co. v. Maintenance of Way Employees*, 481 U.S. 429, 436 n.4 (1987) (injunction on secondary picketing in railway dispute); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976) (protective order on press coverage of criminal trial). If the Court declines to address the issues in this case on the ground of mootness, "the dispute will evade review, or at least considered plenary review in this Court, since [the] orders are by their very nature short-lived." *Nebraska Press*, 427 U.S. at 547.

B. This case also satisfies the second prong of the *Southern Pacific/Weinstein* test: there is a "reasonable expectation" that the Village of Crestwood will "be subjected to the same action again." *Weinstein*, 423 U.S. at 149. The Village has traditionally permitted ethnic festivals, including traditional religicus celebrations, to proceed on Village property. A-2.[1] Indeed, the Village received a request dated February 14, 1991 from the Polish American Community Fair Organization for permission to host a Polish festival at the Village's Caesar Park. As the request for permission states, this festival will include an ethnic Polish mass. A-79.

The Village will issue this permit. The Village does not intend to sponsor the Polish mass, but it also did not intend to sponsor the mass at the 1990 Italian festival. *See* A-7, A-22–A-24. Hence, it is reasonable to expect that respondent or someone else will file an eleventh-hour lawsuit to enjoin the celebration of the planned ethnic Polish mass

[1] Appendix pages A-1 through A-78 are appended to the Petition; pages A-79 through A-81 are appended to this Reply.

on Village property. By waiting until the last moment again, the respondent (or his counterpart) will be able to deprive the Village of any meaningful opportunity to establish that it is not sponsoring the mass. The decision below may well be used as precedent against the Village under these circumstances, unless this Court addresses this issue now.

Carroll v. Princess Anne, 393 U.S. 175 (1968), demonstrates that this case satisfies the "capable of repetition" element of the *Southern Pacific* test. The petitioners in *Carroll* were members of a white supremacist group that held a public rally in Princess Anne, Maryland, on August 6, 1966. At this rally, petitioners made militantly racist speeches to a crowd of whites and blacks, and then announced that the rally would resume the following night. *Id.* at 176. The next day, local officials obtained an *ex parte* order from a state court that restrained petitioners from resuming the rally for ten days. *Id.* at 177. After a trial, the court extended the effect of its earlier order for ten months. The Maryland Court of Appeals affirmed the ten-day order but reversed the ten-month order as unreasonable.

Petitioners sought certiorari to challenge the long-expired ten-day restraining order. Because petitioners planned to hold rallies in the future and had sought permits to do so from respondents, *id.* at 178 n.4, this Court recognized that the challenged situation likely would recur, and that it was important to resolve the underlying question. *Id.* at 179. Consequently, this Court held that the case was not moot, and addressed the issue of "whether, by what processes, and to what extent the authorities of the local governments may restrict petitioners in their rallies and public meetings." *Id.*

The *Carroll* Court further noted that its decision to address the merits was appropriate in light of petitioners' compliance with *Walker v. Birmingham*, 388 U.S. 307 (1967). In *Walker*, the Court had held that an enjoined party cannot challenge the constitutionality of an injunction in the contempt proceedings that follow a violation of that injunction; instead, the proper procedure is to obey the injunction and seek judicial review. Because the *Carroll* petitioners "pursued the course indicated by *Walker*," the *Carroll* Court "[could] not say that their case is moot." 393 U.S. at 179.

The Village also proceeded in accordance with *Walker*: it obeyed the restraining order and attempted to pursue its appeal but never received the opportunity to brief or argue the merits of its appeal in the court of appeals. Further, as in *Carroll*, the Village has established that the challenged situation will recur in the future. In addition to the Italian festival, the Village has held Polish festivals with traditional Polish masses on Village property for the past six years. A-2. And the Village currently has before it an application for a permit to hold the seventh annual Polish festival at which a traditional Polish mass will again be celebrated. A-79. As noted above, the Village intends to issue the permit, which likely will prompt litigation all over again.

C. The fact that the district court dismissed the complaint at petitioners' request is irrelevant to the question whether this case is "capable of repetition, yet evading review." Once the traditional Italian mass was restrained, all that remained of the complaint was a request for permanent injunctive relief against petitioners. Because the Village then had no plans to sponsor any masses, as petitioners' motion to dismiss and supporting papers accurate-

ly point out (Opposition App. 1a-18a), there was nothing to enjoin. Further litigation in the district court on respondent's complaint would have been a meaningless exercise.

The dismissal of the complaint, however, did not moot the very live issue of whether the lower courts erred in issuing and upholding the order that restrained the traditional Italian mass. Indeed, the very essence of the "capable of repetition, yet evading review" doctrine is that the resolution of the immediate controversy between the parties does not moot the case because there is a reasonable expectation that the issues involved will recur. *See Porter v. Warner Co.*, 328 U.S. 395 (1946).

D. Finally, based on its conclusion that respondent was a "prevailing party" under 42 U.S.C. § 1988, on April 23, 1991, the district court ordered the Village to pay respondent's attorneys' fees and expenses in the amount of $14,597.08 for the trial and appellate court proceedings. A-80. If this Court takes this case and reverses the decision below, the respondent will no longer be a "prevailing party." Consequently, the district court will be required to vacate its fee award and instead order respondent to pay petitioners' fees, as they would be the prevailing parties. For that reason as well, this case is not moot.

II.

IF THIS CASE WERE MOOT, RESPONDENT WOULD NOT BE A PREVAILING PARTY UNDER 42 U.S.C. § 1988.

Respondent's argument under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), contradicts his argument that this case is moot. If this case were moot—it is not—it would have become moot in the afternoon of August 11,

1991, after the court of appeals denied the Village's emergency stay motion, A-1, when the Village obeyed the district court's restraining order. Hence, the case would have been moot for 2½ months when the court of appeals, without the benefit of briefs from the parties, issued its opinion, and for 3½ months when the district court dismissed the remainder of respondent's complaint, *i.e.*, his request for a permanent injunction.

Moreover, two justices of this Court have stated that where a case becomes moot before it travels the full appellate course, there can be no "prevailing party" within the meaning of the 42 U.S.C. § 1988, and therefore no award of fees under that statute. In *Alioto v. Williams*, 450 U.S. 1012 (1981), dissenting from the Court's decision to deny a petition for a writ of certiorari, then Justice Rehnquist, with Justice White, opined that parties should not be forced to bear an award of fees where their case became moot before they had been finally determined to have violated the law and where they have steadfastly maintained their innocence. *Id.* at 1013-14. Justice Rehnquist suggested that in these circumstances the courts should follow the procedure outlined in *Munsingwear*, 340 U.S. at 39-40, of vacating the judgment of the court of appeals and remanding the case with instructions to dismiss the complaint. *Id.* at 1014. *See also Kay v. Douglas*, 484 U.S. 1032 (1987) (White, J., dissenting from denial of writ of certiorari).[2]

[2] This Court also recently raised the question of whether an award of Section 1988 fees is appropriate where the judgment was mooted after the judgment was rendered but before the losing party could challenge its validity on appeal. *Lewis v. Continental Bank Corp.*, 110 S.Ct. 1249, 1256 (1990). The Court did not answer the question because it had not been raised below. The Court instead suggested that the lower courts consider it upon remand.

Petitioners have never had the opportunity to submit full argument to any court on the propriety of the district court's restraining order. At the same time, petitioners have steadfastly maintained that their conduct did not violate the Establishment Clause. Consequently, if this Court concludes that this case is moot, it should vacate the judgment of the court of appeals and remand the case with instructions to vacate the award of attorneys' fees and expenses.

III.

REVIEW OF THE COURT OF APPEALS' DECISION IS WARRANTED.

Respondent's argument that this case is not appropriate for review ignores the fact that the record in this case owes its brevity exclusively to his unexplained eleventh-hour filing. If this Court accepts this as a reason for declining to hear this case, it will only encourage such last-minute filings, and will leave petitioners hostage to a respondent who can avoid full litigation of these issues in future cases simply by repeating his tardy filing.

More important, the record in this case provides a sufficient basis on which this Court may decide the two Questions Presented. The district court found that the Village sponsored the mass; the court of appeals affirmed that finding; and petitioners do not now challenge it. (Petition pp. 4-6 & n.1.) The record thus squarely presents the question whether the Village may sponsor this festival mass without violating the Establishment Clause.

Furthermore, petitioners' counsel, the district court, and the dissenting appellate judge all complained of difficulties in understanding and applying *Lemon v. Kurtzman*, 403

U.S. 602 (1971), and the court of appeals majority simply ignored that case in its opinion. It is thus difficult to imagine a more suitable case for reconsidering the *Lemon* test. Indeed, *Lee v. Weisman*, No. 90-1014, presents the very same question to this Court in the context of a public school graduation; by taking this case with *Lee*, this Court will be able to reconsider *Lemon* and Establishment Clause jurisprudence in school and non-school contexts at once.

Finally, now that petitioners have addressed the merits of this case for the first time, respondent has no answer to petitioners' assertion that the decision below "has written the end to more than 200 years of 'religious service[s] under governmental auspices' in this country." (Petition p. 8.) He offers no explanation for the "service carefully arranged for by both houses of Congress" after President Washington's inauguration (Petition p. 9 quoting Stokes, p. 485), for 50 years of regular Sunday services in the House of Representatives, for 100 years of sectarian support for Indian tribes, or for the prayer to the Holy Trinity at President Bush's inauguration. Nor does respondent even suggest, in view of these historical facts, that the *Lemon* test correctly effectuates the purpose of the Establishment Clause.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted and the case set for plenary review.

Respectfully submitted,

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Dated: May 15, 1991

APPENDIX

The Polish-American Community Fair

P.O. BOX 203
CHICAGO HEIGHTS, ILLINOIS
60411

2/14/91

Village of Crestwood Recreation Department,

Once again plans are being made for our three day festival of the Polish American Community Fair Organization to be held at Caesar's Park and Fairgrounds. As in the past, as part of our heritage and tradition we are seeking permission to hold a Mass on Sunday July 28th, 1991 at 10:30 A.M. to culminate our 3 day event on your fairgrounds.

Respectfully Yours

John J. Puzzuoli

President

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOE,	)	
	)	
Plaintiff,	)	
v.	)	No. 90 C 4655
	)	
VILLAGE OF CREST-WOOD, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

This Court's April 2, 1991 memorandum opinion and order determined that plaintiff John Doe ("Doe") was the "prevailing party" in this 42 U.S.C. §1983 litigation against the Village of Crestwood and its Mayor Chester Stranczyk (collectively "Village"), thus entitling Doe to an award of attorneys' fees and related out-of-pocket expenses under 42 U.S.C. §1988. Doe's counsel have since then supplemented their petition for fees and expenses, and Village's counsel has orally confirmed in open court that there is no objection to the additional items reflected in that supplement.

Accordingly Doe is awarded an aggregate of $13,715.50 in fees and $881.58 in out-of-pocket expenses, for a total of $14,597.08. Village has asked for a stay of enforcement of any order to pay that amount, but no persuasive reason has been advanced for such a stay. Accordingly Village is ordered to pay the amount of the award forthwith. This

is intended to constitute a final order for the entry of judgment for the payment of that amount.

Milton I. Shadur
United States District Judge

Date: April 22, 1991